





# AGRICULTURE DECISIONS

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE  
SECRETARY OF AGRICULTURE AND THE COURTS  
PERTAINING TO STATUTES ADMINISTERED BY THE  
UNITED STATES DEPARTMENT OF AGRICULTURE

## PREFATORY NOTE

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. (53 Fed. Reg. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized by regulatory agency and statute, and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; : 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

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PACKERS AND STOCKYARDS ADMINISTRATION  
DISCIPLINARY DECISIONS

In re: GARY MILLER, d/b/a NORTHWESTERN LIVESTOCK COMM'N CO. and NORTHWESTERN LIVESTOCK COMM'N CO.  
P&S Docket No. 6905.  
Decision and Order filed August 31, 1988.

Failure to maintain a custodial account - Test for insolvency - Classification of assets.

Respondent failed to maintain a custodial account for shippers proceeds and removed trust funds for personal purposes. The fact that no checks were returned for insufficient funds is not a defense. Test for insolvency is whether current liabilities exceed current assets. Classification of assets discussed.

Ben E. Bruner, for Complainant.

Daniel W. Olsen, for Respondents.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This administrative proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*) ("the Act"), was instituted by a Complaint filed on June 29, 1987. An Amended Complaint, filed on February 24, 1988, added as a party, Respondent Gary Miller's recently incorporated firm (TR. 6-7). As used in this decision, the term "Respondent" refers to Gary Miller and to the successor corporation, where applicable.

The Amended Complaint alleges that Gary Miller, d/b/a Northwestern Livestock Commission Company of Hermiston, Oregon, wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) in that, between December 31, 1985, and April 30, 1986, Respondent operated subject to the Act although during that period, Respondent's current liabilities exceeded his current assets. In addition, the Complaint charges that Respondent wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Act's regulations (9 C.F.R. § 201.42), in that Respondent failed to properly maintain and use his Custodial Account for Shippers' Proceeds ("the custodial account"). The Complaint, as amended, alleged that on December 31, 1985, and April 30, 1986, there were deficits of \$162,781.01 and \$109,066.52, respectively, in Respondent's custodial account, and that these deficits were caused by Respondent's failures to make deposits in accordance with the regulations and his transfers of funds from the account.

Respondent filed an Answer to the Complaint on July 21, 1987, and an Amended Answer on February 19, 1988. These Answers denied the Complaints' jurisdictional allegations.

I held a hearing in Portland, Oregon. At the hearing, Oris W. Taylor, Jr., Richard J. Tyner, Delwyn H. Levno, and Ronny Parkerson testified for Complainant while Kenneth E. Lewis, William Wright and Gary Miller testified for Respondent.

The parties filed proposed findings of fact, proposed conclusions of law and briefs. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

### Findings of Fact

1. Respondent Gary Miller, is an individual doing business as Northwestern Livestock Commission Company, whose business mailing address is P. O. Box 134, Hermiston, Oregon 97838. (CX 1; TR 17-19; Amended Answer para. II);

2. Respondent was engaged in the business of buying and selling livestock in commerce on a commission basis and buying and selling livestock for his own account and for the accounts of others (CX 1; TR 17-19, Amended Answer para. II); was registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce for his own account and for the accounts of others (CX 1); and was conducting and operating Northwestern Livestock Commission Company Stockyard, a posted stockyard under the Act. (CX 1, Amended Answer para. II)

3. On February 11, 1987, Gary Miller incorporated his business under the name Northwestern Livestock Commission Co. ("the corporation") (CX 2; TR 20-23; Amended Answer para. II)

4. Since this incorporation, Gary Miller has been President of the corporation; owner of 100% of the corporation's outstanding stock; and responsible for the corporation's direction, management and control. (CX 2; TR 20-23, 263, Amended Answer para. II)

5. The corporation is the successor business entity to Gary Miller, d/b/a Northwestern Livestock Commission Company and has registered with the Secretary of Agriculture as a market agency buying and selling livestock in commerce on a commission basis and as a dealer buying and selling livestock in commerce for its own account or the accounts of others. (CX 2; TR 20-23, 254; Amended Answer para. II)

6. On February 6, 1986, Oris W. (Buddy) Taylor, Supervisory Marketing Specialist of the Portland Regional Office of the Packers and Stockyards Administration ("P & S") conducted a routine review of Respondent's custodial account records to determine if the account was being maintained in accordance with the Act. (CX 36, TR 15-16)

7. Mr. Taylor determined that the custodial account was more than \$100,000.00 short as of December 31, 1985. (TR 24) He discussed this finding with Respondent's bookkeeper, Cynthia Francis. (TR 24) Ms. Francis indicated that the outstanding check list might be incorrect and called Respondent's accountant who provided a lower figure. (TR 24-25) Mr. Taylor then verified the outstanding check list by physically reconciling the canceled checks to Respondent's books. He found Ms. Francis' original figure to be correct. (CX 36; TR 25)

8. Mr. Taylor also found large transfers of funds from the custodial account to Respondent's general operating account which appeared to be in excess of amounts that Respondent was entitled to remove. (TR 24)

9. On February 11, 1986, Mr. Taylor wrote a letter to Mr. Miller which explained his findings and informed Respondent of the custodial account requirements. (CX 36; TR 26-27) Respondent was also requested to submit monthly custodial account analyses to the agency office in Portland, Oregon. That letter, which was received by Respondent on February 13, 1986 (CX 36, p. 2; TR 27), stated:

*The custodial account for shippers' proceeds shall be drawn on only for payment of (1) the net proceeds to the consignor or shipper, or to any person that the market agency knows is entitled to payment, (2) to pay lawful charges against the consignment of livestock which the market agency shall, in its capacity as agent, be required to pay, and (3) to obtain any sums due the market agency as compensation for its services. Any other withdrawal from the custodial account would be considered a misuse of custodial funds and a violation of this regulation.* (CX 36) [emphasis added]

10. In accordance with the letter's instructions, Respondent submitted a custodial reconciliation for February 1986 to P&S. (TR 287) Three P&S employees, Delwyn Levno, Richard Tyner, and Buddy Taylor, conducted a subsequent compliance audit in June 1986. (TR 28, 82, 287) In reviewing Respondent's custodial analysis of February 28, 1986 (TR 286-87), Mr. Levno found that the outstanding checks reported were understated by more than \$100,000.00. (TR 287) Mr. Levno concluded that Respondent had intentionally taken four or five checks which were written in February but were outstanding as of February 28, 1987, removed them from the March records and showed them as having cleared in February 1987 (TR 287-88), an act which caused the liabilities in February to be understated by the amount of those checks, thereby concealing the true amount of the custodial shortage. He believed that this was an attempt to deceive the auditors.

11. The June 1986 compliance audit was divided into three parts, with each investigator having primary responsibility over one part. Mr. Taylor reviewed Respondent's records for evidence of trade practice violations. He found none. Mr. Tyner reviewed the firm's financial condition and found Respondent to be insolvent. Mr. Levno was responsible for the custodial account investigation as well as supervising Mr. Tyner's work. (TR 28, 32, 35, 82)

12. Mr. Levno analyzed all of the relevant records relating to Respondent's custodial account, including bank records, outstanding check lists, and bank reconciliations for December 31, 1985, and April 30, 1986. (TR 84-85)

13. As of December 31, 1985, Respondent had outstanding checks drawn on his custodial account totaling \$261,509.69 and had, to offset these amounts, cash in his custodial bank account of \$98,728.68. This resulted in a deficiency of \$162,781.01 in funds available to pay shippers their proceeds. (CX 22, 23, 24, 25, 26, 40; TR 84-95)

14. As of April 30, 1986, Respondent had outstanding checks drawn on his custodial account totaling \$451,933.47, and had, to offset these amounts, cash in his custodial bank account of \$169,963.30, a deposit in transit of \$519.80, proceeds receivables of \$171,351.93 and checks returned for endorsement of \$1,032.12. This resulted in a deficiency of \$109,066.52 in funds available to pay shippers their proceeds. (CX 27, 28, 29, 30, 31, 32, 33, 34, 35, 26; TR 95-99)

15. Mr. Levno further analyzed Respondent's books and records to determine why such large shortages existed in Respondent's custodial account on December 31, 1985, and April 30, 1986. (TR 100) He first determined the total amount of money the market received for a month and then subtracted the amount of proceeds due to the sellers for that month. The result was the amount of selling expenses and commissions owed to Respondent, the amount that he could legally transfer out of the custodial account. (CX 41, 42; TR 101-111) The excess of the amount transferred out of the custodial account to the general account over the amount to which Respondent was entitled is the amount by which the account was overextended during that period. The three-month total of excess transfers for December 1985, through February 1986, was \$455,007.18. (CX 41, p. 1) This practice of transferring excess funds out of the custodial account also occurred in April 1986, May 1986, June 1986, July 1986, August 1986, November 1986, December 1986, January 1987, February 1987, May 1987, June 1987, July 1987, August 1987, November 1987, and January 1988. (RX 5; TR 163-66)

16. Richard Tyner prepared balance sheets for Gary Miller, d/b/a Northwestern Livestock Commission Company for December 31, 1985, and April 30, 1986. (CX 3,4; TR 41-47) He incorporated a personal financial statement of Gary Miller into his analysis. (CX 39; TR 39, 40-41) On both dates, Respondent was insolvent under the Act. (CX 3,4)

17. As of December 31, 1985, Respondent's current liabilities exceeded his current assets. As of that date, Respondent had current liabilities of \$580,374.03, current assets of \$179,702.06, and an excess of current liabilities over current assets of \$400,671.97. (CX 3)

18. As of April 30, 1986, Respondent's current liabilities exceeded his current assets. As of that date, Respondent had current liabilities of \$462,591.06, current assets of \$71,676.66, and an excess of current liabilities over current assets of \$390,914.40. (CX 4)

19. During the period December 31, 1985, through April 30, 1986, Respondent operated subject to the Act although his current liabilities exceeded his current assets. (CX 41, p. 1)

### CONCLUSIONS OF LAW

As of December 31, 1985, and April 30, 1986, there were shortages in Respondent's custodial account. On December 31, 1985, there was a shortage of \$162,781.01 in Respondent's custodial account. (CX 22) Mr. Levno calculated this amount by offsetting the cash in Respondent's custodial bank account, as shown on his bank statement, of \$98,728.68 with \$261,509.69 of checks outstanding against the account. Mr. Levno's analysis agreed with

Respondent's records. The amount of outstanding checks was determined by reconciling Respondent's list of outstanding checks against the actual checks and the bank reconciliation. (TR 86) A similar analysis performed as of April 30, 1986, disclosed a shortage of \$109,066.52 as of that date. (CX 27; TR 95-98) None of Complainant's figures were challenged by Respondent and Complainant's analysis of the cause of the shortages was not disputed.

Respondent continually transferred from the custodial account amounts in excess of those to which he was legally entitled. Initially, this can be seen by Mr. Levno's analysis of the custodial account in which he took all the receivables due the custodial account which Respondent failed to collect or cover personally and subtracted them from the shortage. (CX 22, 27) On both December 31, 1985, and April 30, 1986, a sizeable deficit still existed in the account even when these debts were subtracted from the account. (CX 22, 27) The reason for this deficit is that Respondent had withdrawn these trust funds for his own personal use. (TR 88)

Mr. Levno prepared a more detailed analysis of these excessive transfers for the months of December 1985, January 1986, and February 1986. (CX 41) For that exhibit, Mr. Levno computed Respondent's total selling expenses, including Respondent's commission, for each month from Respondent's books and records. (TR 100-104) He then subtracted the amount of transfers from the custodial account to the operating account as reflected in Respondent's books. (CX 41) In each case, Mr. Levno found substantial excess funds transferred from the custodial account. Respondent failed to challenge any of these figures.

Every market agency subject to the Packers and Stockyards Act is required to establish and properly maintain a Custodial Account for Shippers' Proceeds (9 C.F.R. § 201.42(b)). Section 201.42(c) of the regulations (9 C.F.R. § 201.31(c)), in effect at the time of the alleged violations, gives detailed instructions on how to properly maintain a custodial account. It states:

- (c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining

proceeds receivable whether or not the proceeds have been collected by the market agency.

Both this Department and the courts have consistently held that the failure of a market agency to maintain its custodial account in accordance with the requirements of section 201.42 constitutes a violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), as well as a violation of section 201.42. *Blackfoot Livestock Commission Company v. Department of Agriculture, Packers and Stockyards Administration*, 810 F.2d 916, 921 (9th Cir. 1987); *In re Murfreesboro Livestock Market, Inc., and Carlton Reeves*, 46 Agric. Dec. \_\_\_\_ (Aug. 13, 1987); *In re Arab Stock Yards, Inc.*, 37 Agric. Dec. 293, 301-02, 310-11 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522 (1977); *In re Hardy*, 33 Agric. Dec. 1383, 1398-1406 (1974); *In re Muller*, 33 Agric. Dec. 53, 60-62 (1974), *aff'd sub nom.*, *Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974); *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596, 605-10 (1968); *In re Anderson*, 26 Agric. Dec. 615, 619-20 (1967); *In re Koenig*, 24 Agric. Dec. 1213, 1219-20 (1965); *In re Bowman*, 23 Agric. Dec. 1074, 1086-89 (1964), *aff'd sub nom.*, *Bowman v. United States Department of Agriculture*, 363 F.2d 81 (5th Cir. 1966); *In re Bowman and Reynolds*, 23 Agric. Dec. 1065, 1068-1071 (1964); *In re Daniels*, 14 Agric. Dec. 903, 913-17 (1955), *aff'd*, *Daniels v. United States*, 242 F.2d 39 (7th Cir. 1957), *cert. denied*, 345 U.S. 939 (1957). If a market fails to handle its custodial account in accordance with 9 C.F.R. § 201.42, it is both unfair and deceptive. "It is deceptive because shippers do not know that their money is being used to extend credit to buyers [or the market itself]. It is unfair because it is using trust money for their own purposes (to extend credit to themselves and others)." *In re Hardy*, 33 Agric. Dec. at 1400. See also *Blackfoot*, 45 Agric. Dec. 590 at 600-05; *Murfreesboro*, *supra*, at 13. Consignors are entitled to rely on the market's compliance with the regulations promulgated under the Packers and Stockyards Act to ensure that their funds are being properly safeguarded in a custodial account. *Blackfoot*, at 600. (TR 135-36)

Respondent committed serious violations of the Act by failing to maintain his custodial account in accordance with the regulations, and by physically removing trust funds from the account and using them for his own purposes. (CX 41) Respondent argued in defense of those actions that he didn't understand the requirements and when he did he took corrective action. Respondent also emphasized that no consignor was injured.

While Mr. Miller's failure to understand the regulations would not exonerate him from the violations even if such was the case, there was evidence to the contrary. Mr. Levno testified, in essence, that the custodial account records had been altered to hide the shortage in the account when he reviewed the records in June of 1986. (TR 286-87)

In addition, Respondent's own exhibits fail to show that he was not misusing trust funds until the time of the hearing. RX (Respondent's Exhibit) 7 is a collection of custodial analyses prepared by Respondent as of the last day of the month beginning November 30, 1986, and going through January 31, 1988. (TR 169-170) RX 5 is a record which purports to show the amount

Respondent was legally entitled to withdraw, the amount he did withdraw and the difference between the two. (TR 163) Respondent's own records show that the amount that Respondent withdrew in November 1986 (\$115,000) - the time when he claims he was first aware of his responsibilities - was more than the amount he was entitled to withdraw at that point (\$93,997.91). In fact, the sum of the excess transfers for the months of November 1986 through January 1988, minus any amounts left in the account during that time, is over \$200,000.00. (RX 5, pp. 12-26) For the period of December 1985 through January 1988, excessive transfers, offset against amounts remaining in the account, were over \$550,000.00. (RX 5)

The fact that no checks were returned for insufficient funds is not a defense. See e.g., *In re Blackfoot Livestock Commission Company*, 45 Agric. Dec. 590, 600-02; *Daniels v. U.S.*, *supra*; *In re Bowman and Reynolds*, *supra*, *In re Paul Rodman and David Rodman*, *supra*.

The Department of Agriculture has adopted the test of insolvency as being whether current liabilities exceeded current assets. If a registrant's current liabilities exceeded its current assets, it is deemed to be insolvent. (9 C.F.R. § 203.10; TR 16) In *Bowman v. U.S. Department of Agriculture, et al.*, 363 F.2d 81, 85 (5th Cir. 1966), the court, in approving this test, stated:

Having in mind the remedial purposes of the Act, we hold that the test used for determining solvency or insolvency under the circumstances here was reasonable. A financial status where current assets exceed current liabilities would be the *sine qua non* of prompt payment.

The Ninth Circuit Court of Appeals also adopted this test in *Blackfoot*, *supra*, at 921. The Court stated:

The Act prohibits operating a stockyard while insolvent. 7 U.S.C. § 204; *Bowman v. United States Department of Agriculture*, 363 F.2d 81 (5th Cir. 1966) Insolvency is defined as current liabilities exceeding current assets. *Bowman*, 363 F.2d at 84-85. The Secretary defines current assets and current liabilities by regulation. 9 C.F.R. § 203.10(b)(1) (1982) (assets); 9 C.F.R. § 203.10(b)(2)(1982) (liabilities).

As of December 31, 1985, and April 30, 1986, Respondent's current liabilities exceeded his current assets. Respondent prepared an analysis for December 31, 1985, in which he did not dispute any of the amounts but rather disputed the classification of certain entries. (RX 1) Respondent also argued that the agency should not have included Respondent's personal assets but should have included only the assets of the business. (TR 150-51)

The P&S December 31, 1985, audit found that Respondent was insolvent by \$400,672.00. (RX 1; CX 3-21; TR 37-65) Mr. Lewis, Respondent's accountant, prepared a balance sheet which excluded Respondent's personal assets and liabilities. This showed that Respondent was still insolvent by \$237,672. (RX 1) An additional technique used by Respondent was to combine only his auction and ranch operations in a balance sheet. This

analysis still showed that Respondent was insolvent by \$82,473. (RX 1) Under any of these analyses, Respondent was insolvent on December 31, 1985. However, the inclusion of Respondent's personal assets by P&S was correct. At the time of the audit, Mr. Miller operated as a sole proprietorship. The policy statement with respect to insolvency discusses "whether a person's current liabilities exceed his current assets." (9 C.F.R. § 203.10) "Person" is defined in the regulations as "individuals, partnerships, corporations and associations." The Packers and Stockyards Administration has interpreted the term "individual" to mean "of or relating to a single human being."

An agency's construction of its own regulation is entitled to great weight. As the Supreme Court stated, "In construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *United States v. Lorianoff*, 431 U.S. 864 (1977); (See also: *Lyng v. Payne*, \_\_\_ U.S. \_\_\_, 106 S. Ct. 2333 (1987)).

I further find that the P&S auditors' classifications of Respondent's assets and liabilities were correct. Respondent's accountant reclassified two items of significance. Respondent Gary Miller's personal balance sheet listed \$112,000 of stock cattle, bulls and horses as current assets. (CX 39, pp. 1, 4) The P&S auditors disagreed and included that item in the other assets section of their balance sheet because they concluded that the assets were not of a current nature. (CX 3; TR 74)

The proper analysis of brood cattle classification was articulated in *Bowman v. United States Department of Agriculture*, 363 F.2d 81, 84 (5th Cir. 1966):

The auditor for the Secretary took the position that certain brood cattle, stocks and bonds, the cash value of life insurance, a mailing permit deposit, and insurance claims should not be classified as current assets and that certain notes and interest payable should be classified as current liabilities. Under such a classification, current liabilities would exceed current assets. We do not believe the position taken by the auditor was improper in this respect. The assets in question were not held with the expectation of immediate conversion.

The *Bowman* case was cited with approval in *Blackfoot Livestock Commission Company v. Department of Agriculture, Packers and Stockyards Administration*, 810 F.2d 916 at 921 (9th Cir. 1987)

The test is therefore not whether Respondent would if he needed the money for his custodial account sell his brood herd, but whether he was planning to sell the livestock within the normal course of his operations within one year.

Another classification issue is whether certain loans from the Farmers Home Administration should have been classified as a current liability or a long term liability. At the time of the P&S audit, Respondent provided the P&S accountants with a personal financial statement, which listed as a current liability notes payable of \$172,000.00. (CX 39) Upon inquiry, Mr. Miller told



the auditors that the note was not due and payable, but that he hoped to obtain other financing and would refuse to allow verification of the notes as it might adversely affect his chances of obtaining the money. (TR 43-44, 70-71) The auditors therefore accepted Miller's classification of the notes as current.

Respondent's accountant, Mr. Lewis, testified that he reclassified the notes as long term, allowing only that portion payable within a year to be classified as a current liability. (RX 1; TR 152-53).

Respondent's attorney submitted the notes after the hearing as RX-11. This exhibit shows that the three notes should have been classified as a current liability at the time of the audit. The three notes existing at the time of the audit were written for principal amounts of \$65,000.00, \$49,500.00, and \$72,000.00, respectively. (RX 11) The total amount of principal for the three notes was therefore \$186,000.00 at the time the notes were executed. On June 27, 1986, after the P&S audit, Respondent reamortized each of these notes. (TX 11)

For example, the \$65,000.00 note of February 11, 1981, was reamortized on June 27 at a principal amount of \$98,502.10. The reamortized note is to terminate at the same time as the original note of \$65,000.00. The original note and the reamortized note each contain a clause stating, "[f]or each rescheduled, reamortized or consolidated note, interest accrued to the date of this instrument shall be added to principal and such new principal shall accrue interest at the rate evidenced by this instrument." (RX 11, pp. 1, 4) The difference between the original note and its reamortization is accrued interest. It thus appears that Respondent was behind in his payments on the original note. An appendix to Complainant's brief contains an amortization of the three original notes. This amortization showed that if the Respondent had been current on his yearly note payments in June of 1986, the principal balance on the \$65,000.00 note would have been \$58,691.24. The large difference (\$39,810.86) between what the principal should have been and what it was upon refinancing supports the conclusion that Respondent was substantially in arrears on the notes. Each note contains the following default clause:

**Default.** Failure to pay when due any debt evidenced hereby or perform any covenant of agreement hereunder shall constitute default under this and any other instrument evidencing a debt of Borrower owing to, insured or Guaranteed by the Government or securing or otherwise relating to such debt; and default under any such other instrument shall constitute default thereunder. **UPON ANY SUCH DEFAULT,** the Government at its option may declare all or any part of such indebtedness immediately due and payable.

The law is clear that if a payment of a note can be demanded, it is properly classified as a current liability. See, *Blackfoot Livestock Commission Company v. Department of Agriculture, Packers and Stockyards Administration*, 810 F.2d 916 at 921 (9th Cir. 1987) Respondent's accountant concurred that if a note was in default and contained a demand clause, the note should

properly be classified as a current liability (TR 195-96). Since all three of the notes apparently were in default as of December 1985 and April 1986, Complainant's auditors were correct in classifying these notes as current liabilities.

That no consignors have, in fact, been unpaid is not a defense.

The argument that there is no evidence of any particular shipper not being paid is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipency. Proof of a particular injury is not required. *Federal Trade Commission v. Radadom Co.*, 316 U.S. 149, 152, 62 S. Ct. 966, 86 L. Ed. 1336; *Fashion Originators Guild of America v. Federal Trade Commission*, 312 U.S. 457, 466, 668, 61 S. Ct. 703, 85 L. Ed. 949.

*In re Bowman and Reynolds*, 23 Agric. Dec. 1065 at 1071, quoting *Daniels v. United States*, 242 F.2d 39, 41-42 (7th Cir. 1957), *cert. denied*, 345 U.S. 939 (1957); *In re Paul Rodman and David Rodman*, P. & S. Docket No. 6607 (May 27, 1988).

It is well established that operating as a market agency or dealer subject to the Act while insolvent is an unfair and deceptive practice in violation of section 312(a) of the Act (7 U.S.C. § 213(a)). *In re Southern Buyers, Inc.*, 14 Agric. Dec. 811 (1955); *In re John L. Cooper, et al, d/b/a Cooper Commission Company*, 19 Agric. Dec. 160 (1960).

As a part of the sanction, Complainant requested that Respondent's registration be suspended. (TR 136-37, 291) Respondent contends that such a sanction would not be in compliance with the Administrative Procedure Act (APA). (TR 9-10), (Amended Answer). However, Respondent has failed to substantiate this contention.

Respondent's violations were also wilful. A violation is wilful for administrative law purposes if a respondent intentionally does an act which is prohibited, regardless of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. *Townsend v. United States*, 95 F.2d 352, 357-8 (DC Cir. 1938), *cert. denied*, 303 U.S. 664 (1938); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Butz v. Glover Livestock*, 411 U.S. 182, 185 (1973); *Silverman v. CFTC*, 549 F.2d 29, 31 (7th Cir. 1977); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997.

Complainant recommended that Respondent's registration be suspended for 28 days and thereafter until these financial and custodial problems are corrected. (TR 136-37, 291) Respondent argued that such a suspension would impose a hardship on its customers. I am not convinced of this. Moreover, "[a]ny hardship to the Respondent's community, customers or employees which might result from a suspension order is given no weight in determining the sanction. [T]he national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interests which might be temporarily damaged as a result of a suspension order." Campbell, *The Packers and Stockyards Administrations Regulatory*

*Program* in 1 Davidson, Agricultural Law at section 3.30 (1981 and 1986 Cum. Supp.).

A suspension period of 28 days is consistent with the sanctions imposed in similar cases and is warranted. The Packers and Stockyards Administration is a relatively small agency and is unable to monitor the financial condition and trade practices of each registrant on a daily basis. Where violations are found, sanctions must be sufficiently severe to deter Respondents and others from violating the Act. *In re Miller*, 33 Agric. Dec. 55, *aff'd sub nom. Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974). The rationale for the Department's severe sanction policy is set forth at length in numerous decisions, including *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. \_\_\_\_\_, slip op. at 213-51 (Mar. 19, 1987), *aff'd*, \_\_\_\_\_ F.2d \_\_\_\_\_ (No. 87-7189) (9th Cir., March 8, 1988; *Blackfoot*, *supra*, at 922; and *In re Murfreesboro Livestock Market, Inc., and Carlton Reeves*, 46 Agric. Dec. \_\_\_\_\_ at 33-36 (1987).

It is also common in cases where a respondent has been found to be insolvent or to have a shortage in its custodial account to include as part of the sanction a provision suspending it until it demonstrates that it is solvent or that the deficit in the custodial account has been eliminated.

#### Order

Northwestern Livestock Commission Co., the successor entity to Gary Miller, d/b/a Northwestern Livestock Commission Company, its agents and employees, directly or through any corporate or other device, in connection with its operations subject to the Act, shall cease and desist from:

1. Engaging in business subject to the Act while its current liabilities exceed its current assets;
2. Failing to deposit in its Custodial Account for Shippers' Proceeds, within the time prescribed by section 201.42 of the regulations (9 C.F.R. section 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock;
3. Using custodial funds for any purpose other than the payment to consignors of the proceeds from the sale of their livestock; and
4. Failing to otherwise maintain its Custodial Account for Shippers' Proceeds in strict conformity with the requirements of section 201.42 of the regulations.

Northwestern Livestock Commission Co. and Gary Miller, as its *alter ego*, are suspended as a registrant under the Act for a period of 28 days, and thereafter until such time as Northwestern Livestock Commission Co. demonstrates that the shortages in its custodial account have been corrected and its current liabilities no longer exceed its current assets. At such time a supplemental order terminating the suspension will be issued.

This Order shall become final and effective 35 days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the applicable Rules of Practice (7 CFR § 1.145).

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**In re: GARY MILLER, d/b/a NORTHWESTERN LIVESTOCK COMM'N CO. and NORTHWESTERN LIVESTOCK COMM'N CO.**

**P&S Docket No. 6905.**

**Order Denying Motion for Reconsideration filed January 26, 1989.**

Ben E. Bruner, for Complainant.

Daniel W. Olsen, for Respondents.

*Order issued by Edwin S. Bernstein, Administrative Law Judge.*

On August 31, 1988, following a hearing and consideration of posthearing briefs, I issued a Decision and Order in which I found that Respondent violated the Packers and Stockyards Act, 1921, as amended and supplemented by engaging in business subject to the Act while its current liabilities exceeded its current assets and by failing to deposit in its custodial account for shippers proceeds within the time prescribed by the Act and regulations an amount equal to the proceeds received from the sale of consigned livestock.

On September 16, 1988, Respondents filed a Petition for Reconsideration which contended that the Decision was based upon statements that were factually incorrect and contrary to the facts. On October 14, 1988, Petitioner filed reply in which it opposed the Motion for Reconsideration.

After carefully considering the arguments presented by Respondent and all of the evidence and applicable law, the Motion is denied for the reasons set forth in the original Decision and Order.

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**In re: GARY MILLER, d/b/a NORTHWESTERN LIVESTOCK COMM'N CO. and NORTHWESTERN LIVESTOCK COMM'N CO.**

**P&S Docket No. 6905.**

**Consent Order filed May 31, 1989.**

Ben E. Bruner, for Complainant.

Daniel W. Olsen, for Respondents.

*Consent Order issued by Donald A. Campbell, Judicial Officer.*

By agreement of the parties, respondents' appeal is withdrawn and the Initial Decision and Order by Administrative Law Judge Edwin S. Bernstein is adopted as the Final Decision and Order, except that the order is modified as set forth below.

### Order

The Initial Decision and Order by Administrative Law Judge Edwin S. Bernstein is adopted as the Final Decision and Order, except that the order is modified as follows:

1. The 28-day suspension of respondents shall commence on May 28, 1989; and
2. Gary Miller may be employed by a registrant at the end of the 28-day definite period of suspension.

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In re: GREAT AMERICAN VEAL, INC. a corporation, and THOMAS BURKE, an individual.  
P&S Docket No. 5998.  
Decision and Order filed January 19, 1989.

Judicial Officer affirmed Administrative Law Judge but increased civil penalty--Sanction policy--Evidence.

The Judicial Officer affirmed Chief Judge Palmer's order requiring respondents to cease and desist from purchasing livestock while insolvent unless the full purchase price is paid at time of purchase; failing to pay, when due, the full purchase price of livestock; issuing checks in payment for livestock without sufficient funds available in the account; and giving any unreasonable reference or advantage to any person in connection with payment for livestock purchased in cash sales, and requiring respondents to keep full and accurate accounts and records. However, the Judicial Officer reversed the ALJ's civil penalties totaling \$39,000, and assessed civil penalties totaling \$129,000, as requested by complainant. Complainant originally requested \$5,000 in civil penalties for the payment violations, and \$60,000 for alleged trust-dissipation violations. After the Judicial Officer agreed with the ALJ that no trust-dissipation violations occurred (because respondents had adequate funds to pay all cash sellers of livestock, even though they did not use their cash to make such payments), the Judicial Officer *avunculo* increased the civil penalties for the payment violations to \$65,000. In addition, the Judicial Officer increased the civil penalties of \$30,000 imposed by the ALJ to \$60,000, because respondents took over the inventory of another packing company and sold it for their own account, creating false documents to facilitate the inventory takeover, when respondents knew that the inventory was subject to the statutory trust provisions of the Act. The corporate veil is pierced so that the individual who is the president and sole owner of the corporate respondent is subject to the requirements of the order and the civil penalties. The Judicial Officer inferred that respondents are able to pay the civil penalties since the individual respondent failed to comply with the ALJ's subpoenas duces tecum as to a current financial statement and income tax returns. Severe sanction policy explained. Ignorance of the law is not a mitigating circumstance under USDA's sanction policy. Since respondents failed to testify, inference is drawn that their testimony would have been adverse to their position. The ALJ properly refused respondents' request under the Jones Act provisions of the rules of practice to require complainant to turn over investigative report material to the ALJ for an *in camera* examination. Where the ALJ improperly admitted an exhibit for only a limited purpose, the Judicial Officer considered the exhibit as evidence for all purposes relevant to the proceeding. Similarly, the Judicial Officer treated as evidence an exhibit refused by the ALJ, containing pleadings in a bankruptcy proceeding of which respondents had knowledge, since the pleadings give rise to the inference that respondents were aware of the trust requirements under the F&S Act.

Eric Paul, for Complainant

Gary S. Jacobson, Marvin B. Segal and Harnet B. Rosen, for Respondents  
*Decision and Order issued by Donald A. Campbell, Judicial Officer.*

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).<sup>1</sup> An initial Decision and Order was filed on July 17, 1986, by (now Chief) Administrative Law Judge Victor W. Palmer (ALJ) ordering respondents to cease and desist from purchasing livestock while insolvent unless the full purchase price is paid at time of purchase; failing to pay, when due, the full purchase price of livestock; issuing checks in payment for livestock without sufficient funds available in the account; and giving any unreasonable preference or advantage to any person in connection with payment for livestock purchased in cash sales. The order requires respondents to keep full and accurate accounts and records, and assesses civil penalties totalling \$39,000.

On August 20, 1986, complainant appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>2</sup> Complainant seeks a civil penalty of \$129,000. On September 24, 1986, respondents filed an answer to complainant's appeal, including a cross-appeal, requesting that \$30,000 of the ALJ's civil penalty relating to paragraphs III and IV of the complaint be set aside or reduced. The case was referred to the Judicial Officer for decision on October 3, 1986.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondents, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, portions of the initial decision are adopted as the final decision in this case, with changes or additions indicated by brackets, and omissions indicated by dots. The order assesses civil penalties totalling \$129,000, as requested by complainant. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

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<sup>1</sup>See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1987 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Hart, *Agricultural Law*, ch. 71 (1986).

<sup>2</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted* in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in 1971, having been involved with the Department's regulatory programs since 1949: 3 years' trial litigation, 10 years' appellate litigation relating to appeals from the of the prior Judicial Officer; and 8 years as administrator of the Packers and Act regulatory program) (December 1962-January 1971).

**ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION**  
**Preliminary Statement**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*, hereinafter "the Act"), instituted by a Complaint and Notice of Hearing filed on March 25, 1982. The complaint was filed by the Acting Administrator, Packers and Stockyards Administration, United States Department of Agriculture. It seeks the imposition of a cease and desist order and the assessment of civil penalties against both the corporate respondent, a packer subject to the requirements of the Act, and its president and sole stockholder, Thomas Burke, for willful violations of the Act.

The complaint alleges that in an attempt to avoid any loss on sales to a failing California packer in 1980, respondents, with the California packer's cooperation, violated the Act by causing business records respecting the sales to be falsified to support a false claim that they were consignment transactions, when in fact they were not, and to implement the acquisition and sale for the corporate respondent's account, of the California packer's inventory, the bulk of which was then subject to the trust claims of unpaid cash sellers of livestock. The complaint alleges that these actions were taken to circumvent the statutory trust and/or the security interest of a secured lender bank. The complaint further charges that in 1981, respondents committed further violations of the Act by failure to pay, when due, the full purchase price of livestock purchased in cash sales; issuance of non-sufficient fund checks in payment of some of its livestock purchases; failure to hold in trust funds and accounts receivable for the protection of unpaid cash sellers of livestock; and by giving a cash seller of livestock an unreasonable preference over other sellers.

An answer was timely filed, but this proceeding was delayed to allow various issues to be resolved in other litigation. Respondents admitted the jurisdictional allegations of the complaint and have entered into stipulations respecting various transactions that are the subject of the complaint. In addition to telephonic conferences, a prehearing conference was held in Washington, D. C. on April 19, 1985. Oral hearing was held before me in New York City on May 7-10 and May 19-31, 1985. Complainant was represented by Eric Paul, Office of the General Counsel, United States Department of Agriculture; Respondent Great American Veal, Inc., was represented by its attorney Gary S. Jacobson; and Respondent Thomas Burke was represented by his attorneys, Marvin B. Segal and Harriet B. Rosen. At the close of complainant's case, respondents rested and called no witnesses. Briefing was extensive and was not completed until June 12, 1986. In their briefs, the parties revisited several rulings made during the oral hearing, and respondents moved to strike portions of complainant's brief and various of its proposed findings on the basis of being unrelated to the complaint and the conclusions proposed. Upon considering all arguments by the parties on these ancillary matters, it is concluded that [some of] the evidentiary rulings at the

hearing should ...<sup>3</sup> be changed ...; that complainant has adequately complied with the requirements of the Jencks Act as they apply to this proceeding under the governing Rules of Practice; and that respondents' motion to strike is denied. All of the arguments, findings and conclusions proposed by both parties have been considered in full, and every proposed finding and conclusion not set forth or incorporated as part of this Decision and Order has been denied as not in accord with evidence of record having significant relevance to material questions of fact or law.

Upon considering the evidence of record and the arguments and briefs by the parties, I have decided that respondents have violated the Act necessitating the issuance of the attached Order which requires both respondents to cease and desist from various practices, prescribes specific record-keeping requirements for the future, and assesses civil penalties against them, jointly and severally, in the total amount of \$[129,000].<sup>4</sup>

Inasmuch as respondents have by stipulations and admissions agreed to the entry of various findings and conclusions respecting their operations in 1981, the findings and conclusions are divided to better identify the issues which are in dispute. In keeping with this division, findings and conclusions respecting respondents relationship with the failing California packer during 1980 shall be presented after those pertaining to events of 1981.

#### Findings Pursuant To Stipulations<sup>5</sup>

1. Great American Veal, Inc., hereinafter referred to as "GAV," is a New Jersey corporation. Its principal place of business is located at No. 50 Avenue L, Newark, New Jersey 07105.

2. GAV is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for the purpose of slaughter and of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

3. Thomas Burke, hereinafter sometimes referred to as "the individual respondent," is an individual whose business mailing address is No. 50 Avenue L, Newark, New Jersey 07105.

4. The individual respondent is, and at all times material herein was:

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<sup>3</sup>The word "not" is omitted.

<sup>4</sup>The ALJ's civil penalties totalled \$39,000.

<sup>5</sup>The findings added by the Judicial Officer are not based on stipulations. In addition, some of respondents' stipulations were withdrawn when complainant insisted on introducing evidence notwithstanding the stipulations, but respondents offered no evidence and, therefore complainant's evidence is not contradicted.



- (a) President of GAV;
- (b) Owner of one hundred percent (100%) of GAV's stock; and
- (c) Responsible for the direction, management and control of GAV.

5. GAV's average annual livestock purchases during the year 1981 exceeded \$500,000.00.

6. GAV's current liabilities, as of July 31, 1981, exceeded its current assets. As of July 31, 1981, GAV had current liabilities of \$1,830,459.00 and current assets of \$1,473,466.00, resulting in an excess of current liabilities over current assets of \$356,993.00.

7. GAV's current liabilities, as of August 31, 1981, exceeded its current assets. As of August 31, 1981, GAV had current liabilities of \$2,043,828.00 and current assets of \$1,737,256.00, resulting in an excess of current liabilities over current assets of \$306,572.00.

8. GAV's current liabilities, as of October 23, 1981, exceeded its current assets. As of October 23, 1981, GAV had current liabilities of \$3,095,000.00 and current assets of \$2,475,000.00, resulting in an excess of current liabilities over current assets of \$620,000.00.

9. GAV filed a petition to reorganize under Chapter 11 of the Bankruptcy Code on October 23, 1981, and continue its operations subject to the Act as a debtor-in-possession.

10. On March 8, 1984, the United States Bankruptcy Court for the District of New Jersey confirmed GAV's Plan of Reorganization.

11. GAV, during the Chapter 11 proceedings and subsequent to the confirmation of its Plan of Reorganization by the Bankruptcy Court on March 8, 1984, has demonstrated a return to solvency in that its current assets have been reported to exceed its current liabilities as of December 31, 1983, and December 31, 1984.

12. (a) GAV, under the direction, management and control of the individual respondent, purchased 2,295 head of formula fed veal calves for slaughter during the period September 22, 1981, through October 20, 1981, for a total purchase price of \$1,022,601.20 as set forth in the table below, and failed to pay, when due, the full purchase price of such livestock.

<u>UNPAID LIVESTOCK SELLER</u>	<u>DATE OF PURCHASE OR DETERMINATION OF PURCHASE AMOUNT</u>	<u>NO. OF VEAL CALVES</u>	<u>PURCHASE AMOUNT</u>
Harl Thomas	9/24/81	50	\$21,1[90.95]
Ohio Veal Growers, Inc.	9/24/81	10	3,410.29

<u>UNPAID LIVESTOCK SELLER</u>	<u>DATE OF PURCHASE OR DETERMINATION OF PURCHASE AMOUNT</u>	<u>NO. OF VEAL CALVES</u>	<u>PURCHASE AMOUNT</u>
Ronnie Richards	9/28/81	120	23,676.66
Edwin & Hilda Ponstein	9/28/81		1,269.12
Douglas A. Goyings	9/30/81	106	51,107.50
Dale Bidwell	10/1/81	1	391.00
Eugene J. Grande	10/2/81	22	11,004.50
Eugene J. Grande	10/5/81	145	70,223.80
Leon W. Weaver	10/6/81	34	12,109.02
Douglas A. Goyings	10/7/81	100	49,801.50
Edward & Wayne deYoung	10/9/81	42	18,946.38
Vern & Randy Hulst d/b/a Hulst Bros. Veal	10/9/81	80	32,872.53
Leon Van Timmerman d/b/a Van Timmerman Farms	10/9/81	193	79,431.34
Richard E. Evans	10/12/81	90	42,496.30
Eugene J. Grande	10/12/81	20	9,994.48
James E. Kissinger	10/12/81	9	4,531.78
Nu-Day Veal, Inc.	10/12/81	107	57,979.38
Johnny Sampson	10/12/81	118	56,067.28
Dean Davis	10/12/81	80	35,779.27

<u>UNPAID LIVESTOCK SELLER</u>	<u>DATE OF PURCHASE OR DETERMINATION OF PURCHASE AMOUNT</u>	<u>NO. OF VEAL CALVES</u>	<u>PURCHASE AMOUNT</u>
Johnny Sampson	10/13/81	38	17,511.98
Ben Kruthoff	10/16/81	1	380.70
Bob Vander Veen	10/16/81	101	46,298.25
Robert Kotman	10/16/81	87	41,226.40
Robert Cooper	10/16/81	62	22,604.35
Robert Cooper	10/16/81	101	53,929.80
Henry Kuperus	10/16/81	258	122,203.35
Jerry Nicnhaus	10/16/81	21	7,282.07
Alvin Snyder	10/20/81	69	31,540.70
Edward & Wayne deYoung	10/23/81	3	278.24
Ken Draisma d/b/a Preferred Veal	10/23/81	<u>222</u>	<u>97,872.45</u>
	TOTALS:	2,295	\$1,022,601.20

[The transactions set forth above in this finding were cash sales of livestock entered into with producers who had not signed written credit agreements. (Tr. 1267-68).<sup>6</sup>]

(b) Respondents failed to pay, when due, these cash sellers of livestock, and written trust notices were timely filed to preserve trust interests totalling \$1,022,601.20.

(c) In purported payment of three of these livestock purchases, respondents issued four checks totalling \$131,250.25, which were returned [because the corporate respondent did not have sufficient funds available in the account upon which such checks were drawn to pay such checks when presented], as follows:

<sup>6</sup>No effort has been made by the Judicial Officer to cite all relevant records to form a basis for his findings or conclusions.

<u>LIVESTOCK SELLER</u>	<u>NO. OF VEAL CALVES</u>	<u>CHECK NO.</u>	<u>DATE PRICE DETERMINED AND CHECK ISSUED</u>	<u>CHECK AMOUNT</u>	<u>D A T E S DISHONORED BY BANK</u>
Vern & Randy Hulst d/b/a Hulst Bros. Veal	80	1874	10/9/81	\$32,872.53	10/20/81 10/28/81
Leon Van Timmerman d/b/a Van Timmerman Farms	198	1875	10/9/81	43,031.00	10/20/81
Leon Van Timmerman d/b/a Van Timmerman Farms		1876	10/9/81	36,409.34	10/28/81
Edward & Waller deYoung	42	1877	10/9/81	18,946.38	10/20/81

[Yes. I took [\$]7,000 something of my own personal savings, the last that I had. I borrowed--I had to borrow [\$]12,000 from another bank just to make up for the bad checks. I borrowed \$700.00 from my mother who is 82 years old, and I just didn't have any other resources. It was either get something in here--and the interest rate was 18 to 20 percent at the time, and here I am paying interest on that outstanding balance that I eventually got paid for of 80 some thousand dollars or whatever the figure was, plus the operating and bond payment that I had to take care of in addition to that.

So I had 20 percent interest as a regular thing, and then double that because I am carrying an outstanding balance that should have been paid off a long time ago, and here I have to carry it all of this time.

I just couldn't take the weight of it. It was too much.

So I did what I had to do. But if I were in the position, I would have held out until this very day for every penny that I had coming.]

[The three other veal growers who testified in this proceeding, Douglas A. Goyings, Robert Cooper and Henry Kuperus, experienced similar undue economic pressure to settle their trust claims. Mr. Cooper initially rejected respondents' settlement offer, but later accepted 70% because he was pushed by his bank (CX 28, pp. 1-2; Tr. 221-22, 224). Mr. Kuperus had to grow calves as an employee of a feed company between October 1981, and July 1982, because he could not operate on his own until he obtained his settlement proceeds (Tr. 271-72, 282-85). Mr. Kuperus explained that the Michigan growers were compelled to accept the second settlement offer made to them in the following testimony (Tr. 285):]

[Q. And could you tell us something about the discussion; what was said among the growers?

A. Well, in general, I think that there was an attitude being between a rock and a hard place. Finally we figured that we had better accept, because we couldn't stand to wait who knows how long, you know, for the full amount. So we settled for the \$.70 on the dollar.]

[Mr. Goyings was faced with a note due in May of 1982 and a lack of liquid assets to pay it, absent his acceptance of the second settlement offer of \$.70 on the dollar (Tr. 186-88, 205-07). He explained that there was no way he could hold out the six months to two years from March 1982, that his counsel estimated it would take to fully litigate his trust claim (Tr. 188). He recovered \$70,636.30 on March 31, 1982, by way of his settlement (CX 27, pp. 3-4; Tr. 190-91). Respondents attempted to settle all of the trust claims they could without regard to whether there existed any reasonable question as to the validity of particular claims. The following testimony of Mr. Goyings

regarding the initial settlement offer of \$.60 on the dollar made in Columbus, Ohio, on November 17, 1981, makes this clear (Tr. 186-87):]

(Q. And was there any representation made to you by Mr. Burke or his counsel, with respect to the validity of your trust claim?

A. No, not about the trust claim.

They said that this was the maximum that they could give us for the creditors to accept his reorganization.]

#### Findings on Disputed Facts and Issues

13. [Respondents continued to turn over accounts receivable collections subject to the trust interests of the unpaid cash sellers of livestock listed in Finding 12 above to the Intercontinental Credit Corporation, the secured lender that was financing the corporate respondent's operations during the period October 13, 1981, through October 23, 1981, despite not having been able to honor livestock checks presented on and after October 13, 1981 (CX 17, 20; Tr. 1287, 1308-09). The \$1,046,332.22 in accounts receivable collections turned over to Intercontinental Credit Corporation during this period exceeded advances of \$520,000 by \$526,332.22.] Although GAV applied its accounts receivable collected in October 1981, in excess payment of lesser sums advanced that month on its behalf by Intercontinental Credit Corporation, there remained "sufficient assets subject to the trust to have fully paid all trust beneficiaries." (Complainant's Reply Brief, at page 5.)

14. [On October 23, 1981, \$61,532.17 in accounts receivable due from William Mack, d/b/a Vitelli Veal, a packer located in Hoboken, New Jersey, were written off by respondents in payment of only \$42,712.87 of accounts payable generated by meat purchases made from Vitelli Veal between September 21, 1981, and October 19, 1981. Such action resulted in a net reduction of trust assets of \$18,819.30. (CX 21; Tr. 1309-12). On October 23, 1981, \$70,345.57 in accounts receivable due from Ranchland Meats, a packer located in Patterson, New Jersey, was written off in payment of only \$59,849.07 of accounts payable generated by meat purchases made from Ranchland Meats between September 9, 1981, and October 6, 1981. Such action resulted in a net reduction of trust assets of \$10,496.50. (CX 22; Tr. 1313-15).] Although accounts receivable due from William Mack, d/b/a Vitelli Veal and from Ranchland Meats were written off by GAV on October 23, 1981, in excess payment of lesser sums owed to GAV, . . . there remained "sufficient assets subject to the trust to have fully paid all trust beneficiaries." (Complainant's Reply Brief, at page 5.)

15. On October 23, 1981, respondents wire transferred \$43,882.30 from an account that GAV maintained in the Midlantic Bank in payment for an October 2, 1981, purchase of livestock from Russell Duffy, who was an employee of Prime Veal Farms, Inc., a firm owned by the same family that had been closely associated with respondent, Thomas Burke, in the operation of Muench Meats, the predecessor of GAV. The payment was from an

account not normally used to pay for GAV's livestock purchases and was made at the time other livestock sellers were not being paid and funds were not available in the checking account normally used to pay for livestock purchases. It is inferred that the \$43,882.30 was paid in this manner to Russell Duffy on account of his special relationship with Thomas Burke.

16. Between February 18, 1980, and March 20, 1980, GAV sold [14 shipments totalling] 86,137.1 pounds of [fresh] veal [delivered by United Air Freight] at the total invoice price of \$249,185.27 to Mid-West Veal [Distributors], d/b/a Nagle Packing Company, a packer in severe financial distress located in Los Angeles, California. During that period of time, Thomas Burke and Milton Nagle, President of Nagle Packing Company, discussed the possible merger of their packing businesses. Thomas Burke gave Milton Nagle a Letter of Intent to merge, which Nagle used to dissuade a principal creditor bank from exercising its legal options against Nagle Packing Company. On March 21, 1980, Nagle Packing Company accepted all directions from respondents respecting its day-to-day operations, its inventory, and the disposition of the proceeds it received on sales of product. [R]espondents . . . knew that most of Nagle Packing Company's inventory on March 21, 1980, [totalling 120,580.7 pounds and valued at about \$218,118] consisted of veal purchased from local suppliers on a cash basis who had not been paid in full and, otherwise, were of the class to whom Nagle Packing Company owed a statutory duty to preserve its inventory, receivables and proceeds as trust assets for their protection. . . .<sup>7</sup> [T]wo months before March 21, 1980, Milton Nagle had shown Thomas Burke Nagle Packing Company's complete books which included information on amounts then unpaid and owed to veal growers [, and Milton Nagle and Thomas Burke discussed Nagle's trust responsibilities constantly (Tr. 508-09, 681-82, 718-19). Milton Nagle testified (Tr. 718-19):]

[Q. Did you discuss your trust responsibilities with Mr. Burke?

A. We were both well aware of my trust responsibilities.

JUDGE PALMER: That's not an answer. How would he be aware of it?

A. We discussed - the answer to the question is yes.

Q. When did you discuss it?

A. Constantly.

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<sup>7</sup>The ALJ found that the evidence does not establish whether respondents actually knew that most of Nagle's inventory on March 21, 1980, was subject to the trust provisions of the Packers and Stockyards Act.

Q. Did you reach an understanding as to what responsibility if any that Great American Veal would undertake with respect to those trust responsibilities?

A. No.

Q. You didn't reach any?

A. No.]

There was no express agreement to pay Nagle Packing Company's growers and the two packers neither merged as one nor expressly agreed to merge [, but the Nagles believed that Thomas Burke (GAV) would pay all of Nagle's growers because Burke was getting all of Nagle's inventory. Robert Nagle testified (Tr. 508-09):]

[Q. And you're saying--strike that.

When you were given instruction about transferring product to the terminal by Tom Burke, isn't it true that the product that you were given instruction about was Tom Burke's own product?

A. No.

Q. You state that it was Nagle's product, is that correct?

A. Right.

Q. Do you know whether Tom Burke was--well strike that.

Now with regard to the price of meat which you say was sold to S & V, who made the price on that?

A. My father priced the freezer inventory.

Q. Now who does S & V belong to?

A. Some company that Tom Burke came up with.

Q. And Tom Burke would have let your father price meat that was his customer?

A. No, Tom--

Q. Well then why was your father pricing meat that was sold to S & V?



A. To keep track so he could get a dollar value of the product, Nagle's product being transferred to Great American Veal.

In other words, that was his equity to buy in. If he was going to get 50% of the new company, then all this--whatever was there when Tom Burke came in, was my dad's--that's how much he was giving into the partnership or whatever?

Q. Your father was going to give product to Tom Burke as his equity?

A. That's his--for buying in. And Tom Burke was to take over and pay all the bills.]

[Similarly, Milton Nagle testified (Tr. 681-82, 719-20):]

[Q. What was the nature of the interest that you were going to have in Great American Veal West and Mr. Burke or Great American Veal, Inc. was going to have in Great American Veal West at the time you went to draft articles of incorporation?

A. We were at that time negotiating for a percentage of the profits, plus a commission for me, as my salary.

Q. Were you supposed to have any percentage of the ownership?

A. Not at that time I don't believe.

Q. Initially, in your first negotiation, was that an element?

A. Yes, 50/50 initially.

Q. What had you agreed to do with respect to any assets that you had in Midwest Veal distributors?

A. Everything would go into the new corporation. Nagle Packing would go into the new corporation because it had to assume all the debts.

Q. What debts?

A. To the growers, for the meat; mainly the purchases.

Q. Mr. Burke at this time knew how much you owed growers?

MR. SEGAL: Objection.

Q. Did Mr. Burke know how much you owed growers at this time?

A. Yes.]

....

[Q. When you were discharged by Great American or suggested you should part company with Great American, did you complain to anyone to the packers and stockyard administration about the way you'd been treated by Tom Burke or Great American?

A. No I never had occasion to complain because there was nothing they could do for me. They knew that nothing was going to happen after the fact. Great American did not absorb any of the payments like we assumed he would. I was powerless. I had no cash, I had nothing. I was out. I thought by the liquidation of the accounts receivable, at least the growers had been satisfied.

JUDGE PALMER: What do you mean would have been satisfied?

A. Money-wise.

JUDGE PALMER: You mean they had been paid?

A. Yes.

Q. You didn't know at that time whether they had been paid or were going to be paid when you were terminated?

My understanding was that UCB came second after what Great American had and what UCB had everybody would have been taken care of, and UCB would have been out.

MER: Where did you get that thought from?

account receivable, plus what Great American Veal

JUDGE PALMER: Had you discussed this with anybody?

A. There was nobody - no I didn't. I couldn't talk with UCB and I couldn't talk to Tom Burke. I went to make a plea to Tom Burke at that time when I came in there and that was it.]

[Notwithstanding the fact that GAV took over Nagle's inventory valued at about \$218,118, and kept the proceeds from the sale of Nagle's inventory, GAV did not pay any of Nagle's growers or other creditors. GAV, which was not a secured creditor of Nagle, merely applied the proceeds from the sale of

Nagle's inventory against Nagle's debt owed to GAV, thereby substantially lessening the assets available to pay Nagle's growers, many of whom were entitled to the trust protection provided by the Packers and Stockyards Act.]

[When Packers and Stockyards Administration investigators looked at GAV's records as to the 14 sales by GAV to Nagle (referred to in the first sentence of this finding), the word "consignment" appeared on each copy of the invoices. I infer that this was done so that when GAV took over Nagle's inventory, that would appear to the Packers and Stockyards investigators to be a proper exercise of GAV's rights under the "consignment" transactions.] However, the testimony by Robert Nagle, who was Nagle Packing Company's plant manager, and who is found to be a credible witness, establishes that GAV's sales of veal to Nagle Packing Company were not consignment transactions, and that the word "consignment" as it later appeared on GAV's invoices was false. He also testified that he was directed by Thomas Burke to identify Nagle Packing Company's inventory as GAV's inventory, to alter and destroy records, and to turn over proceeds and inventory to GAV. On March 21, 1980, sales invoices were issued which falsely identified inventory of the Nagle Packing Company as GAV's inventory. It is inferred that the object of respondent's instructions and the false entries on business records was to provide respondents with special advantage over others owed money by this failing corporation. Robert Nagle's testimony, particularly his recollection of his conversations with Thomas Burke, was consistent with that of his father, Milton Nagle, and was corroborated by various business records received in evidence. Moreover, neither Mr. Burke nor anyone else took the stand on respondents' behalf to refute the Nagles' testimony.

### Conclusions on Undisputed Issues

1. Throughout 1981, the respondent GAV was a packer fully subject to the requirements of the Packers and Stockyards Act, 1921, as amended and supplemented, including the statutory trust requirements of 7 U.S.C. § 196.

2. During 1981, the respondent GAV operated as a packer while insolvent, in violation of 7 U.S.C. § 204. An Order should therefore be entered directing GAV to cease and desist from so operating in the future unless the full purchase price of livestock is paid at time of purchase in cash, by cashier's check or by wire transfer of funds. Additionally, a civil penalty of \$1,000.00 should be assessed for this violation.

3. Respondent GAV, in violation of 7 U.S.C. §§ 192(a) and 228b, committed unfair practices when it issued checks which were returned unpaid by the bank and when it failed to pay in full the \$1,022,601.20 it owed for 2,295 head of formula fed veal calves purchased for slaughter during the period September 22, 1981, through October 20, 1981. In addition to the entry of an Order directing respondents to cease and desist from such practices, a civil penalty of \$[6]5,000.00 should be assessed for these violations.

4. Respondents have not been shown to have violated the Act by their dissipation of trust assets, as alleged in Paragraphs VII and VIII of the complaint. [However, I will be willing to reconsider this issue in some future case.]

5. Respondents, in violation of 7 U.S.C. § 192(b), gave, on October 2, 1981, an undue and unreasonable preference and advantage to Russell Duff whom they paid while others who had sold livestock to GAV remained unpaid. In addition to the entry of an Order directing respondents to cease and desist from this practice, the civil penalty of \$3,000.00 requested by complainant should be assessed for this violation.

6. Respondents, in violation of 7 U.S.C. § 192(a), engaged in, and use unfair and deceptive practices, by [taking over Nagle Packing Company inventory and selling it for their own account, when respondent's knew the inventory was subject to the statutory trust provisions of the Packers and Stockyards Act, enacted to protect livestock growers; by] altering GAV invoices to make sales of veal to Mid-West Veal [Distributors], d/b/a Nagle Packing Company, falsely appear to be "consignments" in order to obtain special advantage over others holding claims against the failing Nagle Packing Company; and by causing the issuance, on March 21, 1980, of sales invoice which falsely identified Nagle Packing Company's inventory as GAV inventory. In addition to the entry of an Order pursuant to 7 U.S.C. § 2 prescribing the manner and form in which respondents shall keep its accounts and records in the future, civil penalties of \$[6]0,000.00<sup>8</sup> should be assessed pursuant to 7 U.S.C. § 193(b) for these [unfair practices and] deceptive record-keeping practices which were employed to facilitate respondents' surreptitious acquisition of the assets of Nagle Packing Company which respondents had . . .<sup>9</sup> notice were subject to a statutory trust for the benefit of unpaid cash sellers of livestock and the security interest of a bank.

7. The cease and desist orders, the prescription of future record-keeping requirements and the total civil penalties of \$[129,]000.00,<sup>10</sup> shall be entered and assessed against both GAV, the corporate respondent, and Thomas Burke, the individual respondent, jointly and severally, on the basis that GAV is the mere simulacrum and alter ego of Thomas Burke.

#### Discussion

Respondents' violations in 1981 arise out of its temporary insolvency that year, when it failed to fully pay cash sellers of livestock; issued bad checks to some of them; and gave a favored livestock seller an undue and unreasonable preference.

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<sup>8</sup>The ALJ assessed civil penalties of \$30,000 for these practices.

<sup>9</sup>The word "constructive" is omitted.

<sup>10</sup>The ALJ assessed civil penalties totalling \$39,000.

Respondents' violations in 1980, as framed by the complaint and the briefs, principally consisted of [taking over Nagle Packing Company's inventory and selling it for their own account, when respondents knew that the inventory was subject to the statutory trust provisions of the Packers and Stockyards Act, enacted to protect livestock growers,] subsequently altering invoices of sales to Nagle Packing Company to make them falsely appear to have been consignment transactions, and causing sales invoices to be issued, upon acquiring authority over the Nagle Packing Company, which falsely identified its inventory as owned by GAV, to overcome a statutory trust and the secured interest of a lender bank.

The parties have stipulated and agreed to the essential facts of respondent GAV's insolvency during 1981; its failure to pay cash sellers of livestock in full; and its issuance of bad checks to various livestock sellers. Respondents have agreed that the assessment of \$6,000.00 in civil penalties as complainant has proposed for these violations, is the appropriate sanction for such violations. Therefore, the first three conclusions which implement these stipulated facts and the sanctions which the parties agree are appropriate, require no further discussion. [However, the \$5,000 civil penalties recommended by complainant for the payment violations have been increased to \$65,000 by the Judicial Officer, and the \$60,000 civil penalties recommended by complainant for the alleged trust-dissipation violations are not being imposed.]

Complainant has, however, sought an additional and substantial civil penalty [viz., \$60,000] for GAV's 1981 defaults, on the basis that trust assets were unlawfully dissipated. These charges arise out of GAV's continued operation as an ongoing business during the time of its economic difficulties, when it assigned the proceeds on accounts receivable to a factoring bank instead of setting them aside for the exclusive benefit of cash sellers of livestock. However, complainant has admitted that respondents always had sufficient assets available to pay its sellers, and that fact satisfies the requirements of 7 U.S.C. § 196(b).

As held by the Fifth Circuit, 7 U.S.C. § 196(b) contemplates "a floating pool of . . . assets." *In re Gotham Provision Co., Inc.*, 669 F.2d 1000, 1010-1011 (5th Cir. 1982). This holding was based on the legislative history of the section when added in 1976, as illustrated by this colloquy in which Rep. Thorne stated to Rep. Latta:

" . . . what will occur is that a 'floating trust' will exist to insure that unpaid livestock cash sellers are ultimately paid. It need not and should not prevent a packer from obtaining a loan on his livestock, meat products and accounts receivable for normally the amount of unpaid cash sellers at any one time should not be very great." (122 Cong. Rec. 12867 (May 6, 1976.))

The Fifth Circuit's holding accepted the position advanced by the Department of Agriculture that the commingling of trust funds with fund outside the trust does not destroy the protection afforded by the trust since the entire commingled fund becomes subject to the lien for the beneficiary

commingled fund to anyone with actual or constructive notice of the tru  
See also, *In re Frosty Mam Meat, Inc.*, 7 B.R. 988, 997 (D. Tenn. 1980).

To adopt a contrary position in this proceeding will not advance the b  
interests of cash sellers of livestock, but will instead undermine a m  
important protection now available to them. [However, I will be willing  
reconsider this issue in some future case, particularly as to wheth  
respondents' actions at least constituted an unfair practice, warranti  
substantial civil penalties.]

The conclusion that respondents gave Russell Duffy an unfair an  
unreasonable preference over other livestock sellers is based on the unrefut  
evidence. The penalty assessed for this violation of 7 U.S.C. § 192(b) adop  
the recommendation of complainant which appears to be fully warranted an  
appropriate in the circumstances.

In addition to respondents' violations in 1981, respondents violated the A  
in 1980 when they engaged in the unfair and deceptive practice of [taking ov  
Nagle Packing Company's inventory and selling it for their own account, wh  
respondents knew that the inventory was subject to the statutory tru  
provisions of the Packers and Stockyards Act, enacted to protect livestoc  
growers,] employing false records and altering others to disguise the exte  
and character of GAV's interest in Nagle Packing Company's inventor  
Respondents chose not to take the stand to controvert the testimony by th  
Nagles or to offer an explanation in contradiction of the natural inference th  
the business records were falsified and altered to advance respondent  
interests over those of others having superior claims against Nagle Packin  
Company's assets. Moreover, the invoices which falsely identified Nagl  
Packing Company's inventory as owned by GAV, were issued afte  
respondents had . . .<sup>31</sup> notice that the inventory was subject to the tru  
claims of unpaid cash sellers of livestock. See *Gatham, supra*, at 1011.

....

Thomas Burke, the individual respondent, is being made the subject of al  
of the requirements of the Order being entered, and the civil penalties bein  
assessed. The evidence is clear that he personally participated in many of th  
acts which have been found to violate the Act. He is the President and sol  
owner of the corporate respondent which is, in every sense, his alter ego and  
unquestionably, this is a case where the corporate veil needs to be pierced to  
effectuate the Act's statutory policy. *Livestock Marketers, Inc. v. United States*  
558 F.2d 748 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978); *Brulun's Freeze*  
*Meats v. United States Department of Agriculture*, 438 F.2d 1332 (8th Cir. 1971)  
*Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983 (9th Cir. 1971)  
*In re Jackson Union Stockyards, Inc.*, 37 Agric. Dec. 1533 (1978), *aff'd sub*  
*nom. Jackson Union Stockyards v. United States Department of Agriculture*, 59  
F.2d [770] (5th Cir. 1979); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 54  
(1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978)

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<sup>31</sup>The word "constructive" is omitted.

[*Accord In re Roaches Pork Packers, Inc.*, 46 Agric. Dec. \_\_\_\_, slip op. at 14 (Apr. 13, 1987).]

The total amount of the civil penalties being assessed is \$[129,000.00. In determining this sum to be appropriate, I have considered the gravity of the offenses, and have concluded that in the light of the substantial size of the corporate respondent's business and Mr. Burke's salary history, it will not unduly affect the ability of either respondent to continue in business.]<sup>12</sup>

Accordingly, the following Order is hereby entered.

## ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

### I. Trust-Dissipation and Payment-Violation Issues.

On June 6, 1988, the Judicial Officer *sua sponte* raised the issue as to whether civil penalties totalling \$65,000 should be assessed because of respondents' payment violations, if the Judicial Officer agrees with the ALJ that there were no trust-dissipation violations. The preamble to the notice states (Notice as to Additional Issue Raised by the Judicial Officer at 1-2):

In accordance with the rules of practice (7 C.F.R. § 1.145(c)), the Judicial Officer is *sua sponte* raising the issue as to whether, assuming, *arguendo*, that the Judicial Officer agrees with the ALJ that the evidence as to the allegations of paragraphs VII and VIII of the complaint does not prove trust dissipation violations or an unfair practice (since respondents had ample funds remaining with which all cash sellers of livestock could have been paid in full), should a civil penalty of \$65,000 be assessed because respondents failed to pay, when due, in full for their livestock. As to the propriety of such an issue being raised *sua sponte*, see *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590, 591, 634-44 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987) (35-day suspension order increased by the Judicial Officer *sua sponte* to 6 months); *In re Thornton*, 41 Agric. Dec. 870, 909-12 (1982) (it does not violate due process or the equal protection clause of the

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<sup>12</sup>[This conclusion, although written by the ALJ with respect to civil penalties totalling \$39,000, is equally applicable to civil penalties totalling \$129,000. Furthermore, I infer that Thomas Burke is able to pay \$129,000 in civil penalties since he failed to comply with the ALJ's subpoena duces tecum directing him to produce a current financial statement and Federal income tax returns for the last 3 years (ALJ Ex. 36), notwithstanding the ALJ's warning that he would draw an inference that both Thomas Burke and GAV have the ability to pay the requested penalties in full (Tr. 1406-17; and see CX 35, in which GAV's Balance Sheet for December 31, 1984, shows current assets of \$1,948,313 and current liabilities of only \$693,533). In addition, my order in *In re Great American Veal Co.*, 45 Agric. Dec. 1770 (1986), *aff'd*, No. 86-3998 (D.N.J. Oct. 27, 1987), withdraws inspection service indefinitely from GAV (which, as a practical effect, would put it out of the slaughtering business) unless Thomas Burke withdraws from the company within 90 days and sells his stock within 1 year. This order resulted from the conviction of Thomas Burke of 23 counts of contributing and supplementing the salary of the Federal meat inspector assigned to the plant "with bad purposes" to "display or disregard the law" (45 Agric. Dec. at 1772, 1869-70), particularly with regard to lice-infested calves (45 Agric. Dec. at 1874-1904).]

Constitution for the Judicial Officer to increase the sanction when the respondent appeals, either *sua sponte* or at the request of complainant in its response to respondent's appeal), *aff'd*, 715 F.2d 1508 (11th Cir. 1983); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-52 (1977) (30-day suspension order increased by the Judicial Officer *sua sponte* to 60 days), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978).

The discussion in the Judicial Officer's notice is set forth in full below (ending with n. 14, *infra*), but is not indented, as is customarily done in quoted material.

### Discussion

Complainant's request for a \$5,000 civil penalty based on respondent's failures to pay promptly and in full for livestock was based on the fact that substantial \$60,000 civil penalty was being requested for the trust-dissipation violations. Accordingly, if complainant's trust-dissipation theory fails, it would be entirely consistent for complainant to request a \$65,000 civil penalty for the failure to pay violations, if no penalty is assessed for the paragraphs VII or VIII alleged violations.

In *In re Garver*, 45 Agric. Dec. 1090, 1101-04 (1986) [, *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988)], it is explained that to 5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30- to 60-day suspension orders would have been issued in comparable cases a few years ago. It would seem appropriate to increase civil penalties in the case of a packer's failure to pay for livestock, in a comparable manner.

The *Garver* case explains the serious nature of failures to pay for livestock and the need for a very severe sanction in failure to pay cases, as follows (Agric. Dec. at 1101-04):

Respondent's failure to pay for about \$700,000 worth of livestock fully justifies the 2-year suspension order requested by complainant. It should be noted that there has been a drastic change in complainant's sanction policy with respect to failure to pay violations in recent years. For many years, a person who deprived the livestock seller of 1% of the value of his livestock by false weighing would be given a more severe sanction than a person who deprived the livestock seller of 100% of the value of his livestock by failing to pay for the livestock. In the latter case, a 30-day suspension order was typical. (I inherited that policy and did not change it during the period I was administrator of the Packers and Stockyards Act regulatory program.)

I suggested a drastic change in that policy in *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978). In that case, livestock sellers lost over half a million dollars because respondents took money from



their livestock business, which was needed to pay sellers, and lost it gambling on the commodity futures market (37 Agric. Dec. at 550). Complainant recommended the usual 30-day "slap on the wrist" suspension order, which was imposed by the ALJ. When *respondent* appealed, *I sua sponte* raised the issue as to whether the sanction should be increased on appeal, and suggested in an order requesting additional briefs that a 5-year suspension order seemed appropriate. In imposing a 60-day suspension order in that case, it is stated (37 Agric. Dec. at 550-51):

Just last year Congress indicated its concern that livestock producers be paid for their livestock by the enactment of amendments to the Packers and Stockyards Act which impose payment requirements even more stringent than those previously imposed by the regulations issued under the Act (Public Law 94-110, 94th Cong., 2nd Sess.; 90 Stat. 1249). In the House Report on the bill relating to these amendments, it is stated (H. Rep. No. 94-1043, 94th Cong., 2nd Sess., p. 5; see, also, Sen. Rep. No. 94-932, 94th Cong., 2nd Sess., pp. 5-6):

USDA figures show that in 1973 some \$31 billion worth of livestock and \$4 billion worth of poultry were marketed in the United States, representing approximately one-third of all farm income. Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance. No individual is engaged in a riskier endeavor or one more vital to the national interest than the producer. And no entrepreneur is so completely at the mercy of the marketplace. The livestock producer, if he successfully combats the vicissitudes of weather, financing, skyrocketing costs, etc., must sell when his cattle are ready irrespective of the market. His livestock may represent his entire year's output. And, if he is not paid, he faces ruin. While some may argue that business is business and that farmers must take their chances along with everyone else, this Committee must view the situation from a larger perspective. We would be derelict in our responsibilities to the American people if we failed to address the evils which have inflicted heavy losses upon the very producers upon whom the Nation depends for such an important part of its basic food supply.

In two recent cases involving failure to pay for about \$766,000.00 and \$3.2 million dollars worth of livestock, respectively (*In re Robert L. Benefiel*, 32 Agric. Dec. 1684 (1973); *In re James L. Heller*, 34 Agric. Dec.

(1975)), respondents were suspended for five years. Although these cases are not weighty precedents because one is a consent case and the other a default case, they show, nonetheless, that a 5-year suspension order is at least regarded as appropriate in some failure to pay cases. I believe that the respondents' failure to pay over half a million dollars in the present case warrants a similar 5-year suspension order, particularly since the respondents took the money from their successful livestock business to finance their gambling ventures.

Under a similar regulatory program administered by the Department involving perishable agricultural commodities, a violator's license is routinely revoked for failing to pay a significant amount of money for produce, even where such failure is because of legitimate business losses. See, e.g., *In re Reese Sales Company*, 28 Agric. Dec. 1150 (1969), affirmed *sub nom. Reese Sales Company v. Hardin*, 458 F.2d 183 (C.A. 9); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26 (1976), [aff'd, No. 76-1613 (9th Cir. Mar. 9, 1977)], printed in 36 Agric. Dec. 467 (1977).<sup>6</sup> A revoked licensee may not apply for a new license for two years. 7 U.S.C. § 499d(b).

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<sup>6</sup>Accord *In re B.G. Sales Co.*, 44 Agric. Dec. [2021 (1985)] (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took \$50,000 of respondent's funds in the bank's possession); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. [1505 (1983)] (nonpayment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983) (nonpayment because another firm failed to pay respondent \$248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (nonpayment because of bankruptcy), aff'd, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982) (nonpayment because of bankruptcy), aff'd, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (nonpayment because of bankruptcy of another firm owing respondent \$776,459.23), appeal dismissed, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47

(1982) (nonpayment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (nonpayment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (nonpayment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (nonpayment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (nonpayment because of strike and failure of others to pay respondent), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (nonpayment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (nonpayment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (nonpayment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); accord *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (nonpayment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (nonpayment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (nonpayment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Soll*, 35 Agric. Dec. 721, 723-24 (1976) (nonpayment because of bankruptcy of another firm owing respondent over \$130,000); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (nonpayment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (nonpayment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties).

...in this case warrant a 5-year suspension order to serve as an effective deterrent to future similar violations, the complainant, in the oral argument before the Judicial Officer, recommended only a 60-day suspension order. Since it is the policy of the Judicial Officer "never to increase the sanction recommended by the administrative officials" (see Appendix, p. 21a), a 60-day suspension order will be issued rather than a 5-year suspension order.

Subsequent to the decision in *Mid-States*, just quoted, the Judicial Officer overruled that portion of the Department's sanction policy which precluded him from imposing a sanction greater than that recommended by the administrative officials (*In re Rowland*, 40 Agric. Dec. 1934, 1952 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983)). Accordingly, if *Mid-States* were to be decided today, a 5-year suspension order would be issued.

The ALJ felt that it would be desirable to permit respondent to continue in the livestock industry with the safeguards that are presently in place. I disagree! It is not desirable to permit respondent to continue in the livestock industry since that would seriously undercut the deterrent value of the administrative sanction imposed in this case. It would encourage respondent and others to act in a similar irresponsible manner in the future, greatly endangering livestock sellers.

The ALJ also indicated that under the proposed arrangement to permit respondent to remain in the livestock business during all but 30 days of the 2-year suspension period, respondent's creditors could receive a "token" repayment of the indebtedness. However, that argument has routinely been rejected in determining sanctions imposed by this Department. It has consistently been held that any hardship to the respondent's creditors, customers, community, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interests that might be damaged as a result of a suspension order.<sup>7</sup>

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<sup>7</sup>*In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. [590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987)]; *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. [118 (1984)]; *In re Oliveria, Jackson, Oliveria, Inc.*, 42 Agric. Dec. 1151, 1172 (1983); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 606 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*,

728 F.2d 347 (6th Cir. 1984); *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re VPC, Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and see *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

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In many of the cases cited in note 6 of *Garver*, quoted above, the PACA creditors "voluntarily" accepted less than 100% of the amount owed in bankruptcy proceedings, and urged the Judicial Officer to impose a very lenient sanction on the bankrupt violator so that the violator could continue in business. All of such requests for leniency were routinely denied by the Judicial Officer, since the national public interest in deterring similar violations must prevail over the narrow interests of particular creditors (see the cases cited in *Garver*, note 7, quoted above).

In denying the petition for reconsideration in *Garver*, quoted above, it is emphasized that severe sanctions should be imposed in nonpayment cases, even where there was no misbehavior (such as fraud) by the respondent. The decision states (45 Agric. Dec. at 1957-59):

On August 15, 1986, respondent filed a petition for reconsideration challenging Finding of Fact 11 and arguing that a severe sanction is inappropriate and would have no deterrent effect on respondent or others.

Finding 11, which relates to respondent's sale of property used as security by the bank for its line of credit, and the bank's termination of the line of credit, is fully supported by the record. Moreover, it makes no difference why the bank terminated its line of credit. As stated in the original decision herein, note 2, the "bank's action in withdrawing respondent's line of credit did not cause his loss of at least \$700,000 [which is the actual cause of respondent's failure to pay], but merely exposed his insolvent condition."

... respondent argues that  
... should only be imposed in nonpayment cases where  
the nonpayment occurred because of fraud. Respondent's argument  
would, however, emasculate the 1976 payment provisions enacted by  
Congress. The Act was amended in 1976 to provide (7 U.S.C. § 228b):

**§ 228b. Prompt payment for purchase of livestock**

**(a) Full amount of purchase price required; methods of payment**

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

**(b) Waiver of prompt payment by written agreement; disclosure requirements**

... "withstanding the provisions of subsection (a) of this  
and subject to such terms and conditions as the  
may prescribe, the parties to the purchase and sale of  
may expressly agree in writing, before such purchase  
to effect payment in a manner other than that required  
tion (a) of this section. Any such agreement shall be  
in the records of any market agency or dealer selling  
ck, and in the purchaser's records and on the accounts

or other documents issued by the purchaser relating to the transaction.

(c) Delay in payment or attempt to delay deemed unfair practice

Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

The 1976 payment amendment does not use the term fraud or any synonym thereof. Congress was not concerned merely with fraudulent failures to pay. Congress was concerned with all failures to pay (see the legislative history quoted in the original decision herein at 18). The 1976 payment amendment was enacted because livestock buyers (primarily packers) failed to pay for substantial amounts of livestock. See *In re Beef Nebraska, Inc.*, 44 Agric. Dec. [2786 (1985), *aff'd*, 807 F.2d 712 (8th Cir. 1986)]. As stated in the House Report on the 1976 amendatory legislation (H.R. Rep. No. 1043, 94th Cong., 2d Sess. 5 (Apr. 14, 1976)):

Between 1958 and early 1975 167 packers failed, leaving livestock producers unpaid for over \$43 million worth of livestock. By far the largest of such failures was that of American Beef Packers (ABP), which went bankrupt in January 1975, leaving producers in 13 states unpaid for a total of over \$20 million in livestock sales.

The average loss to livestock sellers as a result of each packer failure from 1958 through early 1975 was \$257,485.02 ( $\$43,000,000 \div 167 = \$257,485.02$ ). If we omit the one \$20 million failure of American Beef Packers, the average loss to livestock sellers from each packer failure from 1958 through early 1975 was \$138,554.21 ( $\$23,000,000 \div 166 = \$138,554.21$ ).

In contrast to the average loss of \$138,554.21, just quoted, respondents' financial failure caused livestock sellers to lose about \$300,000, or more than twice the average loss caused by packer failures, excluding American Beef.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous

decisions, e.g., *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. [268, 435-62 (1987)], *aff'd*, 841 F.2d 1451 (9th Cir. 1988), which is set forth as [Appendix A to this decision].<sup>13]</sup>

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, e.g., *In re Tiemann*, 47 Agric. Dec. \_\_\_\_ (Oct. 20, 1988) (5-year suspension for failure to pay \$27,000 for livestock, to be terminated after 180 days if full payment made); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. \_\_\_\_ (Aug. 13, 1987) (1-year suspension for custodial account violations and various fraudulent activities); *In re Parchman*, 46 Agric. Dec. \_\_\_\_ (May 28, 1987, (90-day suspension and \$10,000 civil penalty for weighing violations), *aff'd*, 85 F.2d 858 (6th Cir. 1988); *In re Rotches Pork Packers, Inc.*, 46 Agric. Dec. \_\_\_\_ (Apr. 13, 1987) (\$50,000 civil penalty for failing to pay for meat products); *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. [268 (1987)] (10-year suspension and \$30,000 civil penalty for increasing prices and weights in commission purchases), *aff'd*, 841 F.2d 1451 (9th Cir. 1988); *In re Welch*, 4 Agric. Dec. 1932 (1986) (decision as to Benson) (\$10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act for fraud by an auction market employee); *In re Garver*, 45 Agric. Dec. 1090 (1986) (2-year suspension for failing to pay for livestock), *aff'd*, 846 F.2d 1029 [(6th Cir.), *cert denied*, 109 S. Ct. 63 (1988)]; *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986) (\$50,000 civil penalty for commercial bribery), *remanded*, 820 F.2d 1103 (9th Cir. 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986) (\$50,000 civil penalty for commercial bribery); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590 (1986) (6-month suspension for custodial account and check-kiting violations), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (decision as to Millsbaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year, for check-kiting, custodial account and payment violations, and purchasing livestock for speculation out

<sup>13]</sup>Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, e.g., in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. 557, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (5th Cir. 1980) (unpublished); *In re Gold Bell-J&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-1378, *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In Michelsenhuter*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Berglund*, 570 F.2d 701 (5th Cir. 1978); *In re Cordale Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 9 (1978); *In re Cotanzano*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (5th Cir. Mar. 1977), *aff'd*, 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 779, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 5 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 9 (5th Cir. 1975); *In re J. Acord & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 5 F.2d 977 (5th Cir. 1975); *In re Martin Trappash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 5 F.2d 1255 (5th Cir. 1975); *In re Tiemann Livestock, Inc.*, 33 Agric. Dec. 499, 515, 530-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 61, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).]



consignments); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand) (8-month suspension and \$10,000 civil penalty for fraudulent sales and purchases); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final consent decision*, 44 Agric. Dec. 1971 (1985) (\$10,000 civil penalty for discriminatory promotional allowances); *In re Powell*, 46 Agric. Dec. 49 (1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. 1220 (1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984) (\$77,000 civil penalty, with \$27,000 suspended, for payment, bond and trust violations); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year suspension for payment violations), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. 1848 (1983) (\$20,000 civil penalty for bait-and-switch advertising and deceptive practices), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

It should be noted that in applying the Department's severe sanction policy to nonpayment cases, it makes no difference whatever whether the livestock seller is a cash seller entitled to statutory trust protection. Even if a livestock seller expressly extends credit, in writing, so as to waive the statutory trust protection, it is still an unfair practice for a packer to fail to make full payment to such a seller. A failure to make full payment to a credit seller of fruits and vegetables (because of bankruptcy) routinely results in an order revoking the license of the violator under the Perishable Agricultural Commodities Act. Similarly, a severe civil penalty should be imposed against a packer under the Packers and Stockyards Act, in analogous situations.<sup>14</sup>

Complainant filed a brief in agreement with the Judicial Officer's position, and respondents opposed the position. For the reasons set forth in the discussion above, I am assessing civil penalties totalling \$65,000 for respondents' payment violations.

The real damage to the livestock growers in this case is that they were not paid promptly or in full for their livestock. (By being forced to accept 70¢ on the dollar, growers lost about \$270,000 (Tr. 623-26)). That damage is the same regardless of the reasons underlying respondents' payment violations. Accordingly, just as in the case of similar violations under the Perishable Agricultural Commodities Act, severe sanctions should be imposed under the Packers and Stockyards Act for payment violations, irrespective of the reasons underlying violations.

In the present case, however, respondents' violations were particularly egregious because respondents had sufficient funds that could have been used to pay all livestock growers entitled to trust protection promptly and in full. But respondents chose not to do so. They contested the livestock growers' claims in the bankruptcy proceeding even though there was no significant issue as to the validity of the claims, and there was no basis for challenging the trust status of the growers' claims.

Respondents argued in the bankruptcy proceeding that the trust protection was not applicable because of credit agreements. But the regulations under

<sup>14</sup>This is the end of the quotation from the Notice as to Additional Issue Raised by the Judicial Officer.

the Act expressly require written credit agreements between a packer and livestock grower. The regulations provide (9 C.F.R. § 201.200):

§ 201.200 Sale of livestock to a packer on credit.

(a) No packer whose average annual purchases of livestock exceed \$500,000 shall purchase livestock on credit, and no dealer or market agency acting as an agent for such a packer shall purchase livestock on credit, unless: (1) Before purchasing such livestock the packer obtains from the seller a written acknowledgment as follows:

On this date I am entering into a written agreement for the sale of livestock on credit to \_\_\_\_\_, a packer, and I understand that in doing so I will have no rights under the trust provisions of Section 206 of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 196, Pub. L. 94-410), with respect to any such credit sale. The written agreement for such selling on credit

Covers a single sale.

Provides that it will remain in effect until (date).

Provides that it will remain in effect until canceled in writing by either party.

(Omit the provisions not applicable.)

Date \_\_\_\_\_

Signature \_\_\_\_\_

(2) Such packer retains such acknowledgment, together with all other documents, if any, setting forth the terms of such credit sales on which the purchaser and seller have agreed, and such dealer or market agency retains a copy thereof, in his records for such time as is required by any law, or by written notice served on such person by the Administrator, but not less than two calendar years from the date of expiration of the written agreement referred to in such acknowledgment; and

(3) Such seller receives a copy of such acknowledgment.

(b) Purchasing livestock for which payment is to be made by a draft which is not a check, shall constitute purchasing such livestock on credit within the meaning of paragraph (a) of this section. (See also § 201.43(b)(1).)

(c) The provisions of this section shall not be construed to permit any transaction prohibited by § 201.61(a) relating to financing

by market agencies selling on a commission basis, or by § 201.68 relating to financing packers by dealers or vice versa.

Prior to respondents' payment violations in 1980, those regulations had been upheld, and it had been held that a livestock grower who had not signed a written credit agreement was entitled to the statutory trust protection. Respondents admit that they had no written credit agreements with the growers involved in this case. Accordingly, there was no basis for respondents' challenge to the claims of the growers, which resulted in the growers having to settle for about 70¢ on the dollar, in order to avoid lengthy litigation in respondents' bankruptcy proceeding.

The trust protection provided by the Packers and Stockyards Act is explained in Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, § 3.77 (1981 and 1987 Cum. Supp.), as follows:<sup>15</sup>

### §3.77 Packer Trusts

Packers with average annual livestock purchases of over \$500,000<sup>665</sup> are required to hold all livestock, meats, and receivables or proceeds

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<sup>665</sup>The \$500,000 limit is satisfied as to a new packer which has not yet purchased \$500,000 worth of livestock if its projected average annual purchases will exceed \$500,000. *In re Norwich Veal & Beef, Inc.*, 38 Agric. Dec. 214, 214-22 (remand order), *final decision*, 37 Agric. Dec. 1202 (1978).

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therefrom in trust until all cash sellers, i.e., those who have not expressly extended credit to the packer, have received full payment for their livestock.<sup>666</sup> However, the maintenance of a custodial account or other segregation of funds by the packer is not required.

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<sup>666</sup>7 USC § 196(b)-(c). It has been held that "full payment" includes the principal amount (purchase price), prejudgment interest on that amount from the date following the delivery and acceptance of the livestock, and costs incurred by the suppliers in seeking to enforce their rights." *Pennsylvania Ag Coop Mktg Assn v Ezra Martin Co.*, 495 F Supp 565, 570 (MD Pa 1980). The trust provisions of the act are constitutional. *Fillippo v S Bonaccorso & Sons, Inc.*, 466 F Supp 1008, 1012 n 2 (ED Pa 1978); *In re Frosty Morn Meats, Inc.*, BK 77-31707, slip op at 14-24 (Bankr Ct MD Tenn Aug 31, 1978), *aff'd*, 7 BR 988,

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<sup>15</sup>The following quotation combines the provisions appearing in 1981 and in the 1987 cumulative supplement.

996, 1002-05 (MD Tenn 1980), *appeal dismissed*, No 81-5158 (6th Cir Apr 23, 1981).

In *Certain Unpaid Cash Sellers v Great American Veal, Inc.* (*In re Great American Veal, Inc.*), Adversary No 81-1029, slip op at 9-1 (Bankr Ct D NJ Oct 28, 1982), "full payment" was construed to include prejudgment interest. In *Bast v Orange Meat Packing Co.* (*In re G&L Packing Co.*), 20 BR 789, 808-10 (Bankr Ct NDNy 1982), *aff'd*, 41 B 903 (NDNY 1984), prejudgment and postjudgment interest was awarded to the packer's creditors.

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Middlemen, such as market agencies and dealers, are entitled to the benefit of the trust provisions.<sup>667</sup> Also, an order buyer buying for a

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<sup>667</sup>*Bast v Orange Meat Packing Co.* (*In re G&L Packing Co.*), 20 BR 789, 802 (Bankr Ct NDNy 1982), *aff'd*, 41 BR 903 (NDNY 1984); *In re Frosty Morn Meats, Inc.*, BK 77-31707, slip op at 1-10 (Bankr Ct MI Tenn Sept 14, 1978) (re middlemen; another decision also filed the date), *aff'd*, 7 BR 988, 997, 1019-22 (MD Tenn 1980), *appeal dismissed*, No 81-5158 (6th Cir Apr 23, 1981).

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packer, which pays an auction market for livestock upon the packer's default, is entitled to be subrogated to the auction market's statutory trust benefit as an unpaid cash seller.<sup>668</sup> In addition, a trust claim can be assigned, with the assignee perfecting the claim.<sup>669</sup>

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<sup>668</sup>*Fillippo v S Bonaccorso & Sons, Inc.*, 466 F Supp 1008, 1022-23 (ED Pa 1978). However, the department would likely oppose, as inequitable, an attempt by a surety that has paid bond claims to share by subrogation, in the statutory trust.

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<sup>669</sup>*First State Bank of Miami v Gotham Provision Co.* (*In re Gotham Provision Co.*), 1 BR 255, 261 (Bankr Ct SD Fla 1979), *aff'd*, No 79-247-BK-JAG-W (SD Fla July 30, 1980), *aff'd*, 669 F.2d 1000, 1015 (5th Cir), *cert denied*, 459 US 858 (1982). However, the department would likely oppose, as inequitable, an assignment that would be detrimental to the interests of cash livestock sellers.

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A course of conduct under which the seller does not expect the packer to pay promptly in accordance with the payment requirements

of the act and regulations <sup>670</sup> does not defeat the trust provisions

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<sup>670</sup>See §3.59.

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since the seller must expressly extend credit to the buyer to make the transaction a credit sale. <sup>671</sup> Where there has been such a course of

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<sup>671</sup>7 USC §§ 196(c), 228b(b); *Certain Unpaid Cash Sellers v Great American Veal, Inc.* (*In re Great American Veal, Inc.*), Adversary No 81-1029, slip op at 7-9 (Bankr Ct D NJ Oct 28, 1982); *Bast v Orange Meat Packing Co* (*In re G&L Packing Co*), 20 BR 789, 807 (Bankr Ct NDNY 1982), *affd*, 41 BR 903 (NDNY 1984); *In re R&D Invs, Inc.*, BK 77-1225 (Bankr Ct MD Pa Nov 21, 1979), *affd*, No 80-0023 (MD Pa Mar 26, 1980), *appeal dismissed*, No 80-1696 (3d Cir Nov 5, 1980); *First State Bank of Miami v Gotham Provision Co* (*In re Gotham Provision Co*), 1 BR 255, 259 (Bankr Ct SD Fla 1979), *affd*, No 79-247-BK-JAG-W (SD Fla July 30, 1980), *affd*, 669 F.2d 1000, 1004-08 (5th Cir), *cert denied*, 459 US 858 (1982); *Hedrick v S Bonaccorso & Sons, Inc.*, 466 F Supp 1025, 1031-32 (ED Pa 1978); *Filippo v S Bonaccorso & Sons, Inc.*, 466 F Supp 1008, 1019-20 (ED Pa 1978).

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conduct, it has been held that even an express agreement that a packing company may continue to pay "as they have done in the past" is not an express agreement for credit defeating the trust. <sup>672</sup>

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<sup>672</sup>*First State Bank of Miami v Gotham Provision Co* (*In re Gotham Provision Co*), 1 BR 255, 259-60 (Bankr Ct SD Fla 1979), *affd*, No 79-247-BK-JAG-W (SD Fla July 30, 1980), *affd*, 669 F.2d 1000, 1006 n 5 (5th Cir), *cert denied*, 459 US 858 (1982).

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Under the regulations, no packer which has average annual purchases of livestock exceeding \$500,000, and no dealer or market agency acting as agent for such packer, may purchase livestock on credit unless a written acknowledgement in the form specified in the regulations is previously obtained from the sellers, which expressly advises credit sellers that they will have no rights under the trust provisions of the act. <sup>673</sup>

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<sup>673</sup>9 CFR § 201.200; *In re Frosty Morn Meats, Inc.*, BK 77-31707, slip op at 34-35 (Bankr Ct MD Tenn Oct 2, 1978) ("exact language"

specified in the regulations required), *aff'd*, 7 BR 988 (MD Tenn 1980), *appeal dismissed*, No 81-5158 (6th Cir Apr 23, 1981).

The regulation as to packer purchases of livestock on credit, 9 CFR § 201.200, is a substantive rule having the force and effect of law. *First State Bank of Miami v Gotham Provision Co*, 669 F.2d 1000, 1007 n (5th Cir), *cert denied*, 459 US 858 (1982).

It has been held that an express agreement for credit that does not clearly advise sellers that they will have no rights under the law provisions does not act to defeat such rights.<sup>674</sup> It has also been held that credit agreements obtained by misrepresentations or by failure to

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<sup>674</sup>*Gibson v Arbogast & Bastian, Inc (In re Arbogast & Bastian, Inc)*, 42 BR 633, 634-36 (Bankr Ct ED Pa 1984); *Bast v Orange Meat Packing Co (In re G&L Packing Co)*, 20 BR 789, 808 (Bankr Ct NDNY 1982), *aff'd*, 41 BR 903 (NDNY 1984); *First State Bank of Miami v Gotham Provision Co (In re Gotham Provision Co)*, 1 BR 255, 259-60 (Bankr Ct SD Fla 1979) (regulation as to credit agreement is "statement of substantive law"), *aff'd*, No 79-247-BK-JAG:W (SD Fla July 30, 1980), *aff'd*, 669 F.2d 1000, 1004-08 (5th Cir), *cert denied*, 459 US 858 (1982).

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reveal all material facts to the sellers are ineffective to defeat their trust rights.<sup>675</sup>

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<sup>675</sup>*In re Frosty Morn Meats, Inc*, BK 77-31707, slip op at 18-15 (Bankr Ct MD Tenn Oct 2, 1978), *aff'd*, 7 BR 988 (MD Tenn 1980), *appeal dismissed*, No 81-5158 (6th Cir Apr 23, 1981); *In re Frosty Morn Meats, Inc*, BK 77-31707, slip op at 15-24 (Bankr Ct MD Tenn Sept 14, 1978) (re trustee's objections 8-11; another decision also filed this date), *aff'd*, 7 BR 988, 997, 1017-19 (MD Tenn 1980), *appeal dismissed*, No 81-5158 (6th Cir Apr 23, 1981).

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To preserve the benefit of the statutory trust, the payment instrument must be "promptly presented for payment."<sup>676</sup> It has been

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<sup>676</sup>7 USC § 196(b). In *Bast v Orange Meat Packing Co. (In re G&L Packing Co)*, 20 BR 789, 808 (Bankr Ct NDNY 1982), *aff'd*, 41 BR 903 (NDNY 1984), it was held that a check written for an incorrect sum does not have to be presented for payment in order to preserve the statutory trust, and that it is sufficient if the creditor gives notice of

nonspayment within 30 days of the final date for payment (see text accompanying note 678).

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held that this requires presentment within 30 days in the absence of extenuating circumstances, such as physical incapacitation.<sup>677</sup> If the payment instrument is dishonored, the seller must give written notice to the packer and the Secretary of Agriculture within 15 business days

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<sup>677</sup>*In re Frosty Morn Meats, Inc.*, BK 77-31707, slip op at 4-8 (Bank Ct MD Tenn Oct 16, 1978), *aff'd*, 7 BR 988 (MD Tenn 1980), *appeal dismissed*, No 81-5158 (6th Cir Apr 23, 1981).

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after notice thereof, and if payment is not received, the seller must give such notice within 30 days of the final date for payment, to preserve the trust claim.<sup>678</sup>

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<sup>678</sup>7 USC § 196(b). The details which should be included in the notice are stated in 9 CFR § 203.15. It was held in *First State Bank of Miami v Gotham Provision Co (In re Gotham Provision Co)*, No 79-247-BK-JAG-W (SD Fla July 30, 1980), *rev'd in part and remanded*, 669 F.2d 1000, 1012-15 (5th Cir), *cert denied*, 459 US 858 (1982), that timely written notice to the packer, coupled with actual notice to the Secretary, satisfies the notice requirement of the statute. The court of appeals held that written notice must be given to the secretary as well as the packer within the statutory time period, but left open the question (pending findings on remand) as to whether notice to the secretary is timely if such notice is mailed, and the secretary is notified by telephone of such mailing, within the 30-day time period, but the notice is not physically received until after the 30-day time period.

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In *In re Norwich Veal and Beef, Inc.*,<sup>679</sup> which involved a packer's failure to have sufficient money to satisfy the trust requirements, only

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<sup>679</sup>37 Agric. Dec. 1202, 1204-06 (1978).

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a cease and desist order was issued because there was a reasonable question about whether the packer was subject to the trust provisions and the agency's construction of the act was not published or brought to the packer's attention.<sup>680</sup> However, the agency in its appeal brief explained that in such cases, it will seek a civil penalty equal to the

<sup>600</sup>*Id* 1205.

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amount of money that should have been held in trust, plus an additional amount to deter the packer and others from engaging in similar conduct in the future, less any amount attributable to mitigating circumstances.<sup>601</sup>

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<sup>601</sup>Appeal from Decision Following Remand, at 14-15, *In re Norwich Veal & Beef, Inc.*, 37 Agric. Dec. 1202 (1978). The agency's proposed sanction for packer-trust violations referred to in the text was adopted in *In re Mid-West Veal Distributors*, 43 Agric. Dec. [1124, 1152-56 (1984)].

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The agency's recommended order in the case would have held the civil penalty in abeyance for four months to give the packer an opportunity to restore the dissipated trust funds and pay all persons with valid claims on the trust. If that were done, the recommended civil penalty would have been reduced to the deterrent amount, which was \$3,000.<sup>602</sup>

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<sup>602</sup>*Id* 16. In a consent decision issued at about the same time as the *Norwich Veal and Beef* decision, it was stated that a \$40,000 civil penalty was appropriate for improperly dissipating about \$20,000 in trust funds, but only a \$2,500 penalty was imposed for this and other violations because the respondent was without material assets except for current earnings as a used equipment dealer. *In re S&H Cen Meat Packers, Inc.*, 37 Agric. Dec. 400, 407, 408 (1978). In a somewhat similar default case, civil penalties of \$2,400 and \$100 were assessed against the corporate respondent and the individual respondents respectively. *In re Mesa Packing Co.*, 38 Agric. Dec. 30, 37 (1978).

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In the event of bankruptcy, there is no lien on the bankrupt's assets; rather the statute creates a trust which is not an asset of the bankrupt's estate.<sup>603</sup>

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<sup>603</sup>*Certain Unpaid Cash Sellers v Great American Veal, Inc.* (*In re Great American Veal, Inc.*), Adversary No 81-1029, slip op at 6-7 (Bankr Ct D NJ Oct 28, 1982); *In re Frosty Morn Meats, Inc.*, BK 77 31707, slip op at 25-34 (Bankr Ct MD Tenn Aug 31, 1978), *aff'd*, 7 B1 996, 1005-07 (MD Tenn 1980), *appeal dismissed*, No 81-5158 (Ga) pr 23, 1981).

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There is no requirement that a particular seller be able to trace livestock into inventory, receivables, or cash.<sup>684</sup> The trust for

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<sup>684</sup>*Id.* at 49; *First State Bank of Miami v Gotham Provision Co.* (*In re Gotham Provision Co.*), 1 BR 255, 258-59, 260-61 (Bankr Ct SD Fla 1979), *aff'd*, No 79-247-BK-JAG-W (SD Fla July 30, 1980), *aff'd*, 669 F.2d 1000, 1008-12 (5th Cir), *cert denied*, 459 US 858 (1982); *Lykes Bros, Inc. v Tavormina* (*In re Federal Packing Co of Fla*), No 78-1492-BK-CA-B, slip op at 4-5 (Bankr Ct SD Fla Apr 23, 1979).

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livestock sellers is a floating pool of commingled inventories, receivables, and proceeds from cash sales.<sup>685</sup> To segregate such assets from those derived from credit sales requires an audit.

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<sup>685</sup>*First State Bank of Miami v Gotham Provision Co.* (*In re Gotham Provision Co.*), 1 BR 255, 260-61 (Bankr Ct SD Fla 1979), *aff'd*, No 79-247-BK-JAG-W (SD Fla July 30, 1980), *aff'd*, 669 F.2d 1000, 1008-12 (5th Cir), *cert denied*, 459 US 858 (1982); *Lykes Bros, Inc. v Tavormina* (*In re Federal Packing Co of Fla*), No 78-1492-BK-CA-B, slip op at 4-5 (Bankr Ct SD Fla Apr 23, 1979); *In re Frosty Morn Meats, Inc.*, BK 77-31707, slip op at 35-53 (Bankr Ct MD Tenn Aug 31, 1978) (holding that commingled assets from credit transactions are not included in the trust, but placing the burden of separation on the trustee), *aff'd*, 7 BR 988, 996, 1007-13 (MD Tenn 1980), *appeal dismissed*, No 81-5158 (6th Cir Apr 23, 1981). It was held in *First State Bank of Miami v Gotham Provision Co.* (*In re Gotham Provision Co.*), No 79-247-BK-JAG-W, slip op at 5 (SD Fla July 30, 1980), *aff'd*, 669 F.2d 1000, 1008-12 (5th Cir), *cert denied*, 459 US 858 (1982), that "[b]asic trust principles provide that when trust property is commingled with non-trust property, the trust fund beneficiaries have a lien on the commingled fund." *But see* accompanying text to note 683.

In *McLean Cattle Co. v Culton*, 11 BR 162 (Bankr Ct ND Tex 1980), a packer purchased livestock from plaintiff in a cash sale (but with a dishonored check), and had the livestock processed by a third party, together with livestock owned individually by the packer and livestock purchased from other feeders in cash sales, who were paid for their livestock with valid checks. The packer then had the processor wire-transfer funds to the packer's attorney as a retainer fee. Although the wire-transferred funds were never commingled with the packer's funds, the bankruptcy court held that the statutory trust applied to the funds, except for the money from the packer's individually owned livestock. Specifically, the court held that the statutory trust applies to "livestock and proceeds of livestock from all cash sellers, paid and unpaid" (11 BR at 166). In *Bast v Orange Meat Packing Co.* (*In re*

G&L Packing Co), 20 BR 789, 800-09 (Bankr Ct NDNY 1982), *aff'd*, 41 BR 903 (NDNY 1984), it was found that a packer which bought livestock from sellers was the "mere instrumentality" of a second packer which bought the meat from the first packer, so the court pierced the corporate veils and held that the trust for unpaid livestock sellers includes assets of both packers, and also money which had been collected by a bank to which the second packer had pledged its accounts receivable for meat.

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In one case, it was held that the trustee in bankruptcy is responsible for having an audit made at the trustee's expense to segregate assets subject to the trust from other assets, and that the trustee has the burden of showing that assets are not subject to the trust.<sup>666</sup> But in another case, it was held that sellers have the burden of proof to

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<sup>666</sup>*In re Frosty Morn Meats, Inc.*, BK 77-31707, slip op at 49-52 (Bankr Ct MD Tenn Aug 31, 1978), *aff'd*, 7 BR 988, 996-97, 1012-13 (MD Tenn 1980), *appeal dismissed*, No 81-5158 (6th Cir Apr 23, 1981).

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establish the amount subject to their trust, at the expense of the trust.<sup>667</sup> The sellers' burden in the latter case was somewhat diminished by the

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<sup>667</sup>*Lykes Bros, Inc. v Tavormina (In re Federal Packing Co of Fla)*, No 78-1492-BK-CA-B, slip op at 5-6 (Bankr Ct SD Fla Apr 23, 1979).

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ruling that the trustee had the burden of going forward with the evidence by completing the necessary audit, presenting the results, and making the supporting records available for inspection. If the records were incomplete, thereby preventing the trustee from discharging that duty, the court would "presume that all available funds necessary to pay the cattle sellers in full were subject to the statutory trust."<sup>668</sup>

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<sup>668</sup>*Id* 6.

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Notwithstanding the trust protection provided by the Packers and Stockyards Act, the livestock growers involved in this case were deprived the benefit of that protection by respondents' conduct. This was plainly an aggravating circumstance, but, nonetheless, civil penalties totalling \$65,000 would be warranted for the payment violations even in the absence of the aggravating circumstances.

Although ignorance of the law is not regarded as a mitigating circumstance under USDA's sanction policy,<sup>16</sup> I infer that respondents had actual knowledge, at the time the livestock involved in this case was purchased, that the Secretary and a number of United States District Courts and United States Bankruptcy Courts had upheld the validity of the trust regulations and the requirement that credit agreements be in writing.<sup>17</sup>

## II. Respondents' Takeover of the Nagle Inventory, and Creation of False Records Facilitating the Takeover.

The \$60,000 in civil penalties requested by complainant as a result of respondents' takeover of the Nagle inventory and sale of the inventory for their own benefit, defeating the trust protection due the livestock growers who had sold to Nagle, is fully warranted. The ALJ states that complainant is seeking civil penalties only for the record-keeping violations relating to respondents' entry of the word "consignment" on GAV's 14 sales to Nagle. The ALJ states (in a portion of his initial decision omitted above) (Initial Decision at 19):

Complainant has chosen not to seek the imposition of penalties for respondents' surreptitious takeover of the assets, but rather seeks the assessment of a substantial civil penalty for the record-keeping practices employed by respondents to circumvent the trust interests of unpaid veal growers. Complainant relies upon *Basma v. United States*

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<sup>16</sup>As stated in *In re Rothman*, 47 Agric. Dec. \_\_\_, slip op. at 64-65 (May 27, 1988):

Although there is no basis for respondents to have been ignorant of the law with respect to the custodial account requirements, even if they were, it has never been the policy of this Department to limit severe sanctions to the case of intentional violations, or to violations done with knowledge of their unlawfulness. *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). I do not recall any contested case where a respondent has admitted that he knew that he was violating the law. Frequently, I infer that certain conduct was intentional and done with knowledge of unlawfulness (which is done for the benefit of reviewing judges who may dislike my hard-nosed sanction policy), but the sanction would be the same irrespective of those circumstances. *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). In *In re Steuberg Bros. Co.*, 43 Agric. Dec. 1878, 1891 and n. 15 (1984), it is explained that "ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act" because:

If ignorance of the law were a mitigating circumstance, it would be a disincentive to licensees becoming familiar with the regulatory requirements under the Act, which would tend to thwart the purpose of this remedial legislation.

<sup>17</sup>Respondents were sued on April 23, 1981, in connection with the 1980 takeover of the Nagle Packing Company inventory and filed a 27-page answer containing numerous affirmative defenses on August 6, 1981 (CX 25, pp. 48-74). I infer that respondents' attorney discussed the legal issues with respondents. Complainant's offer of proof with respect to CX 25 (Tr. 1414) was well taken, as these pleadings do provide an appropriate basis for such an inference.

*Department of Agriculture*, 754 F.2d 804, 809 (9th Cir. 1984) which held that a civil penalty may be imposed for a first time record-keeping violation when more than simple negligence is involved. The record-keeping practices found to have taken place in this case were in every sense intentional and wilful, and it has been determined that civil penalties of \$30,000.00 for these false and deceptive record-keeping violations are appropriate.

While the ALJ's statement is literally true, it is incomplete. Complainant requested substantial civil penalties (*viz.*, \$60,000) only for the record-keeping practices employed by respondents with respect to the takeover of the No inventory because the \$60,000 requested for the record-keeping portion of violations was sufficient to cover the inventory takeover, which was facilitated by the false records. Complainant states in its initial brief filed November 1985 (Complainant's Brief at 36-38):

The preparation of invoices with the false entry "consignment" or the addition of such false entry to existing invoices constitute an unfair and deceptive practice performed in the course of a scheme to circumvent the trust interests of veal growers who sold their calves to Nagle Packing Company in cash sales. . . .

. . . The actual harm caused by the false and deceptive use of the term consignment is evident. This unfair practice had a direct impact on the value of the unpaid livestock sellers' trust claims in subsequent litigation and, therefore, may be inferred to have diminished the settlement amount received by the growers from the First Interstate Bank in exchange, in part, for an assignment of their rights to proceed against respondent Great American Veal, Inc.

This false entry practice was not confined to the sales invoices by which meat was sold to Nagle Packing Company by the corporate respondent. The sales invoices by which Nagle Packing Company inventory was sold as the property of the corporate respondent also contained a false entry, *i.e.*, the name stated as the owner of the product being sold was false and deceptive. . . . Such sales [of Nagle's inventory by GAV] generated proceeds that should have been included in the Nagle Packing Company trust, but were not so included at the time of collection because of having been unfairly and deceptively sold as the property of respondent Great American Veal, Inc., in violation of Sections 202(a) and 401 of the Act (7 U.S.C. §§ 192(a), 221). Complainant has not sought additional civil penalties by reason of these violations of Section 202(a) solely because the total dollar amount believed appropriate for deterrent purposes has already been asked for with respect to the violations involving the records showing meat sales to Nagle Packing Company. In the event that the penalties are found to be excessive with respect to the unfair practice of . . . the false term consignment, complainant believes that their

assessment would be fully supported by the false identification of the Nagle Packing Company inventory on sales invoices as the property of the corporate respondent.

Similarly in complainant's reply brief, complainant argued that respondents had engaged in a serious unfair trade practice by taking over the Nagle inventory, stating (Complainant's Reply Brief at 9):

13. Respondents conclude their argument on what they refer to as the "California inventory issue" with a review of testimony elicited from Robert and Milton Nagle, which they contend establishes that the respondents never agreed to assume Nagle's statutory trust obligations (Respondents' supplemental brief, pp. 14-16). Complainant agrees that no express agreement to pay growers or final merger was shown (Complainant's proposed finding 29). Where the parties differ is in the significance to be given to such facts. Absent such an agreement, respondents' contend that no duty to the grower beneficiaries can arise and a trust dissipation may not properly be charged either directly, *i.e.*, in violation of 7 U.S.C. § 196(b), or indirectly, *i.e.*, in violation of 7 U.S.C. § 192(a). This argument shows a complete lack of recognition that fraudulent interference with the trust relationship between another packer and its livestock supplier[s] may properly be classified as a serious unfair trade practice that violates Section 202(a) of the Act (7 U.S.C. § 192(a)). Respondents' circumvention of the Nagle trust seriously injured persons entitled to protection under the Act. A fiduciary obligation as trustee is simply not an element of the violation alleged and proven.

Furthermore, complainant's counsel, Eric Paul, expressly explained that III of the complaint involves respondents' takeover of the Nagle inventory, in addition to the false records issue, stating (Tr. 369-70):

MR. PAUL: The Complainant has never taken the position that paragraph 3 of this complaint is focused around these shipments of wool from Great American to Newark, New Jersey and the entry of the word consignment on them.

The focus is that there was 120,000 pounds of inventory that was not the property of Burke, it was subsequently misused in connection with and furthering that misuse, certain examples were set forth in this paragraph, examples of sales of product that could not have been shipped from Burke, examples of shipments from Burke which were mischaracterized to disguise the misuse of this 120,000 pounds.

The key thing in the unfair practice is the misuse on and after March 21st of this 120,000 pounds.

The Nagles testified that respondents were fully advised of the true interest of the livestock growers who had sold to Nagle, and that the Nagles expected respondents to pay their growers, since respondents took over the inventory. Neither respondent Thomas Burke nor anyone else testified on behalf of respondents, notwithstanding the fact that they were specifically advised by the ALJ that an adverse inference would be drawn because of their failure to testify or produce any evidence contrary to that offered by the complainant (Tr. 1417). Under the settled principle that has been followed in many proceedings before this Department,<sup>18</sup> and which has also been followed in many judicial proceedings,<sup>19</sup> I infer that respondents' testimony would have been adverse to respondents' interests here. "It is certain law that all evidence is to be weighed according to the proof which it

<sup>18</sup>E.g., *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. \_\_\_\_ (Aug. 13, 1987); *Corn State Meat Co.*, 45 Agric. Dec. 995 (1986); *In re Farmers & Ranchers Livestock Auction*, 46 Agric. Dec. 234 (1986); *In re Grady*, 45 Agric. Dec. 66 (1986); *In re Hauling Means Delicatessen, Inc.*, 44 Agric. Dec. 1886 (1985); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision remanded); *In re Peaty*, 43 Agric. Dec. 1406 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. Dec. 1984); *In re Jarost Produce Farms, Inc.*, 42 Agric. Dec. 1525 (1983); *In re Farrow*, 42 Agric. Dec. 1397 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits affirm, suspension reversed); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, & 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 & 4 (1983), *aff'd*, 721 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1983), & No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), remanded, CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982 reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Great West Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wicare*, 37 Agric. Dec. 1659, 1667 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 36 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Burns*, 36 Agric. Dec. 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeLong Packing Co.*, 35 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, U.S. 1061 (1980); *In re Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Market, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. den.*, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re S. B. Guiber & Co.*, 31 Agric. Dec. 499 (1972).

<sup>19</sup>2 Wigmore, *Evidence* §§ 285-91 (3d ed. 1940); *United States v. Di Rita*, 332 U.S. 581, 584 (1948); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939); *Kirby v. Tallmadge*, U.S. 379, 383 (1896); *Karavos Compania, Etc. v. Atlantic Export Corporation*, 588 F.2d 1, 3 (2d Cir. 1978); *International Union v. NLRB*, 455 F.2d 1357, 1362-70 (D.C. Cir. 1971); *AFM Int. Inc. Co. v. Wenz*, 352 F.2d 592, 597 (8th Cir. 1965); *Cramling v. Pittsburgh & Lake Erie Co.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman v. CIR*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co. v. Stopley*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhafer v. American Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles v. Lentini*, 151 F.2d 619 (7th Cir.), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Ratchoff*, 108 F.2d 246-57 (C.C.P.A. 1939); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 867-68 (2d Cir.), *cert. den.*, 304 U.S. 576 (1938).

in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch v. Archer*, Cowp. 66, quoted with approval in Wigmore, *Evidence* § 285 (3d ed. 1940).

In view of the great financial benefit accruing to GAV from the takeover of the Nagle inventory and sale of the inventory for the benefit of respondents, and the resulting harm to the livestock growers who sold livestock to Nagle (who should have received the benefit of the Nagle inventory as part of their trust protection), the \$60,000 in civil penalties requested by complainant for all of the violations relating to this matter is clearly warranted. In fact, if I were not assessing an additional \$60,000 in civil penalties for the payment violations (in lieu of the \$60,000 requested by complainant for the alleged trust-dissipation violations), I would assess civil penalties totalling \$120,000 for the Nagle inventory takeover and false records relating thereto.

### III. Procedural Issues.

Respondents contend that the testimony of complainant's investigator, John D. Edmond, should be stricken because complainant refused to comply with their request, under the Jencks Act provisions of the rules of practice (7 C.F.R. § 1.141(g)(1)(iii)), to turn over matters which complainant regarded as its investigative report material (Tr. 816-20, 1025-34, 1100-02, 1117-18, 1141-59, 1300). The ALJ, relying on *In re Machado*, 42 Agric. Dec. 820, 820-57 (remand order), *final decision*, 42 Agric. Dec. 1454 (1983) (decision as to respondent Cozzi), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished) (attached as Appendix B to this decision), refused to require complainant to turn over the material even for an *in camera* examination. The material requested by respondents was not producible under the Jencks Act provisions of the rules of practice, and, in some respects went beyond the scope of direct examination. For the reasons set forth in *Machado*, the ALJ properly refused to require its production even for an *in camera* examination. *Accord In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590, 644 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987). Furthermore, Mr. Edmond's testimony, in the main, relates to respondents' takeover of the Nagle inventory.<sup>20</sup> The precise amounts involved and details are not vital to complainant's case. There is ample evidence in the record, even without Mr. Edmond's testimony, to support the sanction imposed as to this issue, particularly in the absence of any evidence offered by respondents.

Finally, complainant appeals from two evidentiary rulings by the ALJ. First, the ALJ received complainant's exhibit 8 only for the limited purpose of showing what took place as to the Nagle inventory through March 21, 1980 (Tr. 367, 370, 373-74, 1138-40). However, since the complaint alleges in § III

<sup>20</sup>GAV's takeover of Nagle's inventory is discussed at length in *In re Mid-West Veal Distributors, d/b/a Nagle Packing Co., and Milton Nagle*, 43 Agric. Dec. 1124 (1984), attached as Appendix C to this decision. Although respondents in the present case are not bound by that decision, much of the same evidence was introduced in both cases (see Tr. 5), and the present record fully supports the findings as to GAV's takeover of Nagle's inventory, and the subsequent sale of that inventory for GAV's account.

that GAV "took possession of, and sold for the corporate respondent [GAV's] account, the entire meat and meat food product inventory of failing Los Angeles packer [Nagle] beginning on or about March 21, 1<sup>st</sup> complainant's exhibit 8 should also have been received as evidence relating the disposition of the Nagle inventory for GAV's account. Accordingly, complainant's exhibit 8 is considered as evidence in this case."<sup>3</sup>

(It should be noted, however, that there is ample evidence with complainant's exhibit 8 as to GAV's takeover and sale for its own account

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<sup>3</sup>The ALJ expressly advised respondents' attorney that the Judicial Officer might consider excluded evidence, for which an offer of proof was made, as evidence in the case (Tr. 373). As stated in *in re Corpenito Bros., Inc.*, 46 Agric. Dec. 486, 502-03 (1987), *aff'd*, No. 87-1190 *op. cit.* at 1-7 (D.C. Cir. Apr. 19, 1988) (unpublished):

Complainant made an appropriate offer of proof (Tr. 51-54) in accordance with the Department's rules of practice, which provide (7 C.F.R. § 1.141(g)(7)):

(7) *Offer of Proof.* Whenever evidence is excluded by the Judge, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in the transcript in toto. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the hearing record. In either event, the evidence shall be considered a part of the transcript and hearing record if the Judicial Officer, upon appeal, decides the Judge's ruling excluding the evidence was erroneous and prejudicial. If the Judicial Officer decides the Judge's ruling excluding the evidence was erroneous and prejudicial and that it would be inappropriate to have such evidence considered a part of the hearing record, the Judicial Officer may direct that the hearing be re-opened to permit the taking of such evidence or for any other purpose in connection with the excluded evidence.

Under the Department's rules of practice, I am considering complainant's offer of proof as to respondent's noncompliance during the months immediately prior to the hearing as evidence in this proceeding.<sup>4</sup> As stated in *Southern Nat. Mfg. Co., Inc. v. EPA*, 470 F.2d 194, 200 (8th Cir. 1972), "[t]hese provisions for agency review gave adequate advance warning to petitioners that excluded unfavorable evidence might later be admitted to their detriment." Moreover, respondent's attorney was expressly advised that if the Judicial Officer should reverse the ALJ's evidentiary ruling excluding complainant's evidence, he might receive it as evidence without a remand for further proceedings (Tr. 56).

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<sup>4</sup>*In re Thomson*, 38 Agric. Dec. 1425, 1433 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Corona Livestock Auction, Inc.*, 36 Agric. Dec. 1169, 1171 n.2 (1976) (remand order), *final decision*, 36 Agric. Dec. 1385 (1977), *rev'd on other grounds*, 607 F.2d 811 (9th Cir. 1979); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 & n.5 (1976) (fairness to respondents did not require a remand since "respondents' unwarranted objections resulted in the erroneous exclusion of the evidence," and the regulations and complainant's attorney informed respondents that the excluded evidence might later be admitted to their detriment, *id.* n.5), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).



the Nagle inventory, particularly in the absence of any evidence offered by respondents, to support the foregoing findings and conclusions as to this issue.)

Second, the ALJ refused to receive complainant's exhibit 25 (Tr. 1413-14), which contains the pleadings in the Nagle bankruptcy proceeding, giving rise to the inference that respondents were aware of the trust requirements under the Packers and Stockyards Act, including the requirements as to written credit agreements (see note 17, *supra*). That exhibit was relevant for that purpose, and is received in evidence. However, as stated above, even if respondents were ignorant of the trust requirements, that would make no difference in the sanction imposed herein.

For the foregoing reasons, the following order should be entered. Any proposed findings or conclusions by respondents inconsistent with this decision are rejected as erroneous, not supported by the record, or not necessary to the decision herein.<sup>22</sup>

### Order

Great American Veal, Inc., the corporate respondent, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and Thomas Burke, the individual respondent, individually or as an officer, director, agent or employee of the corporate respondent or its successors, in connection with their operations as a packer subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock while insolvent, i.e., while current liabilities exceed current assets, unless the full purchase price of the livestock is paid at time of purchase in cash, by cashier's check or by wire transfer of funds;
2. Failing to pay, when due, the full purchase price of livestock;
3. Issuing checks in payment for livestock without sufficient funds available in the account upon which such checks are drawn to pay such check when presented; and
4. Giving any unreasonable preference or advantage to any person in connection with payment for livestock purchased in cash sales.

Respondents shall keep accounts, records and memoranda which fully and correctly disclose all transactions involved in their business as a packer subject

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<sup>22</sup>This is one of a group of cases that has been unreasonably delayed in the Office of the Judicial Officer. During 1985 and 1986, the workload of the Judicial Officer doubled. Because of budgetary constraints, an assistant was not obtained until November 2, 1986. A great deal more could (and ordinarily would) be written in response to respondents' detailed briefs, but the great backlog of pending appeals, and the inability (because of budgetary constraints) to obtain all of the help that is needed precludes further discussion.

to the Act, including meat and meat food products, inventory records and records showing the full and accurate terms of any agreements entered into with respect to the sale of meat and meat food products and the payment therefor.

In accordance with Section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are assessed civil penalties, jointly and severally, in the total amount of \$129,000 payable not later than the 90th day after the effective date of this Order, to be paid by certified check made payable to the Treasurer of the United States and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400.

#### APPENDIX A

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

#### APPENDIX B

*In re Machado*, 42 Agric. Dec. 1454 (1983) (decision as to respondent Cozzi), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished).

#### APPENDIX C

*In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984).

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In re: GREAT AMERICAN VEAL, INC.  
P&S Docket No. 5998.  
Stay Order filed February 22, 1989.

Enc: Paul, for Complainant.  
Gary S. Jacobson, Marvin B. Segal and Harriet B. Rosen, for Respondents.  
Stay Order issued by Donald A. Campbell, Judicial Officer.

The civil penalty provisions of the order previously issued in this case are hereby stayed pending the outcome of proceedings for judicial review.

The cease and desist and recordkeeping provisions shall remain in effect.

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**In re: GARY CHASTAIN and JIM LEWIS.**  
**P&S Docket No. 6606.**  
**Removal of Stay filed January 26, 1989.**

Dennis Becker, for Complainant.  
Cecil J. Drummond, for Respondent.  
*Removal of Stay issued by Donald A. Campbell, Judicial Officer.*

On March 25, 1988, the effective date of the Decision and Order of the Judicial Officer on February 22, 1988, was stayed pending further legal proceedings. On October 28, 1988, the United States Court of Appeals issued its Mandate regarding its Decision dated September 28, 1988, affirming the Decision of the Judicial Officer.

The time for respondents to petition for certiorari has now expired. Therefore, the Stay of the Order dated February 22, 1988, is lifted. That order shall become effective on the first day after service of this Order.

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**In re: HGS CORPORATION, STEVEN W. SEAQUIST, MELOY II. "SLIM" HART, and OTTO C. GAITHER.**  
**P&S Docket No. D-88-16.**  
**Decision and Order as to Respondent Seaquist filed January 27, 1989.**

The Judicial Officer affirmed Chief Judge Palmer's order requiring respondents to cease and desist from: purchasing livestock while insolvent, unless the livestock is paid for at purchase by cash, cashier's check or wire transfer of funds; issuing checks drawn on insufficient funds for payment for livestock; and failing to pay when due for livestock purchases. The order also assesses respondents, jointly and severally, a civil penalty in the amount of \$3,500.

Edward M. Silverstein, for Complainant.  
Steven W. Seaquist, Pro se  
*Decision and Order issued by Donald A. Campbell, Judicial Officer.*

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 201.1 *et seq.*).<sup>1</sup> An initial Decision and Order was filed on September 1, 1988, by Chief Administrative Law Judge Victor W. Palmer (ALJ) ordering respondents to cease and desist from: purchasing livestock while insolvent, unless the livestock is paid for at purchase by cash, cashier's check or wire transfer of funds; issuing checks drawn on insufficient funds for payment for livestock; and failing to pay when due for livestock purchases. The order also assesses respondents, jointly and severally, a civil penalty in the amount of \$3,500.

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<sup>1</sup>See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1988 Cu. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Hart, *Agricultural Law*, ch. 71 (1980).

On September 12, 1988, respondent Steven W. Seaquist appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.235).<sup>2</sup> The case was referred to the Judicial Officer for decision on November 25, 1988.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. The appeal raises no issues requiring additional comment by the Judicial Officer. (Respondent Seaquist's arguments are, however, appropriately dealt with in complainant's brief.)

### ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

#### Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents willfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

#### Findings of Fact

1. (a) HGS Corporation, hereinafter referred to as HGS, is a corporation organized and operating in the State of Oregon whose mailing address is 1607 SE Railroad Avenue, Redmond, Oregon 97756.

(b) HGS is, and at all times material herein was:

<sup>2</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1946 (5 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted* in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1948 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(c) Steven W. Seaquist, hereinafter referred to as Seaquist, is an individual whose mailing address is 5385 NE 15th Drive, Redmond, Oregon 97756.

(d) Seaquist is, and at all times material herein was:

(1) President and owner of 33 1/3% of the stock of HGS; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(e) Meloy H. "Slim" Hart, hereinafter referred to as Hart, is an individual whose mailing address is 5385 NE 15th Drive, Redmond, Oregon 97756.

(f) Hart is, and at all times material herein was:

(1) Vice President and owner of 33 1/3% of the stock of HGS; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(g) Otto C. Gaither, hereinafter referred to as Gaither, is an individual whose mailing address is 5385 NE 15th Drive, Redmond, Oregon 97756.

(h) Gaither is, and at all times material herein was:

(1) Secretary and owner of 33 1/3% of the stock of HGS; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(i) HGS is, and at all times material herein was, under the management, direction and control of Seaquist, Hart and Gaither.

2. (a) As of March 31, 1987, the current liabilities of HGS exceeded its current assets. As of that date, the total current liabilities of HGS were \$105,095.21 and its total current assets were \$48,969.37. This resulted in an excess of current liabilities over current assets of \$56,125.84.

(b) HGS' current liabilities presently exceed its current assets.

3. HGS, under the management, direction and control of Seaquist, Hart and Gaither, on or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, and on other

occasions, issued checks in payment of the net proceeds due from a purchase of livestock, which checks were returned unpaid by the bank upon which they were drawn because HGS did not have and maintain sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented.

4. On or about the dates and in the transactions set forth in paragraph 1 of the Complaint and Notice of Hearing, and on other occasions, HGS, under the direction, management and control of Seaquist, Hart and Gaither, failed to remit, when due, the full purchase price due from its purchase of livestock.

5. HGS, under the management, direction and control of Seaquist, Hart and Gaither, failed to keep accounts, records and memoranda which fully and correctly disclosed all transactions in its business as a packer under the Act in that it failed to keep and maintain (a) a general ledger; (b) cash receipts or a cash disbursement ledger; (c) a subsidiary accounts payable ledger; (d) record showing the number of any checks which were replaced by wire transfers; (e) a record of its livestock purchases including the number of head purchased and all livestock purchase invoices; (f) a log of livestock receipts including cost; and (g) kill sheets, which include the date and the identity of the animals.

### Conclusions

By reason of the facts found in Finding of Fact 1 herein, respondents Seaquist, Hart and Gaither are the *alter egos* of respondent HGS.

By reason of the facts found in Finding of Fact 2 herein, the financial condition of HGS does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Findings of Fact 3 and 4 herein respondents have violated Sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

By reason of the facts found in Finding of Fact 5 herein, respondents have violated Section 401 of the Act (7 U.S.C. § 221).

### Order

HGS Corporation, its successors and assigns, its officers, directors, agents and employees, directly or through any corporate or other device, and Steve W. Seaquist, Meloy H. "Slim" Hart and Otto C. Gaither, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock while insolvent, i.e., while current liabilities exceed current assets, unless the livestock is paid for at the time of purchase by United States currency, cashier's check or wire transfer of funds;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds to pay such checks when presented.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including (a) a general ledger; (b) cash receipts or a cash disbursement ledger; (c) a subsidiary accounts payable ledger; (d) a record showing the number of any checks which were replaced by wire transfers; (e) a record of its livestock purchases including the number of head purchased and all livestock purchase invoices; (f) a log of livestock received including cost; and (g) kill sheets, which include the date and the identity of the animals.

In accordance with Section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are jointly and severally assessed a civil penalty in the amount of Three Thousand Five Hundred Dollars (\$3,500.00). The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this Order on respondent Scaquist.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on respondent Scaquist. The recordkeeping provisions shall become effective on the 10th day after service of this Order on respondent Scaquist.

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In re: PAUL RODMAN and PAUL DAVID RODMAN,  
P&S Docket No. 6607.  
Supplemental Order filed February 6, 1989.

Eric Paul, for Complainant.

Gerard D. Eftiak, for Respondents.

Supplemental Order issued by Donald A. Campbell, Judicial Officer.

On May 27, 1988, an Order was issued in the above-captioned matter, which, *inter alia*, suspended respondents as registrants under the Act for 35 days and thereafter until they demonstrate that any deficits in their Oklahoma Stockyard and Chandler Stockyard custodial accounts have been eliminated. A stay order was issued on October 18, 1988; such stay order was lifted on November 28, 1988, making the suspension provisions effective beginning January 2, 1989.

Respondents have now demonstrated that the custodial account shortages have been corrected. The 35 day period of definite suspension shall expire on February 5, 1989. Accordingly,

It is hereby ordered that the suspension provision of the order issued May 28, 1988, is terminated effective February 6, 1989. The order shall remain in full force and effect in all other respects.

In re: DANNY COBB and CROCKETT LIVESTOCK SALES CO., INC.  
P&S Docket No. 6587.

Decision and Order filed February 13, 1989.

Judicial Officer affirmed Administrative Law Judge--Burden of proof--Definition of "willfully explained--Findings of fact by Administrative Law Judge--Sanction policy explained--Claims of bias of Judicial Officer.

The Judicial Officer affirmed Judge Baker's order requiring respondents (Crockett Livestock Sales Co., Inc. (Crockett), and its owner and president, Danny Cobb) to cease and desist from engaging in business without maintaining a reasonable bond or its equivalent; failing to deposit in their custodial account, within regulatorily-imposed times, amounts equal to the proceeds of consignors for livestock purchased by respondents, and amounts equal to outstanding promissory notes due from other purchasers of livestock; failing to otherwise maintain their custodial account in strict conformity with the regulations; and permitting employees engaged in the conduct of respondents' auction sales to purchase livestock out of consignment for personal resale. The order requires respondents to keep and maintain true and correct records. The order suspends respondent Crockett for 6 weeks, and thereafter until it demonstrates that its custodial account shortage has been eliminated; provided, that when this shortage is eliminated a supplemental order will be issued terminating the suspension, after the 6-week period. The order suspends respondent Cobb as a registrant under the Act for 6 weeks. The order imposes a civil penalty of \$5,000, jointly and severally, upon respondents Crockett and Cobb. Complainant's proof surmounts the preponderance of the evidence, which is all that is required. Operating without an adequate bond is a violation of the Act, and efforts to obtain a bond do not mitigate from the violation. Proof of particular injury is not required, since it is the duty of the agency to stop unlawful practices in their incipency. A violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts in careless disregard of the statutory requirements. The Judicial Officer has authority to consider an offer of proof as evidence, without a remand, in appropriate circumstances, but complainant failed to show appropriate circumstances to support its admission of a proffered exhibit concerning the premature release of pledge collateral from its trust fund at respondents' bank, since it would not affect the sanction. The Act's provision prohibiting an unfair "practice" refers to a practice in the regulated industry, and does not require that the respondent in an individual case indulge in the activity long enough to amount to a course of conduct. Failure to maintain a custodial account as required is a violation of the Act, irrespective of a market's line of credit. The criteria applicable to civil penalties under U.S.C. § 213(b) are not applicable to suspension orders. Findings of fact by ALJs are given great weight by the Judicial Officer. Severe sanction policy explained. The Department's adjudicatory procedures do not violate due process, since the Judicial Officer is not both an investigator and an adjudicator. Claims of bias on the part of the Judicial Officer have been routinely rejected on judicial review. A recordkeeping order is appropriate irrespective of whether respondents' records are false and inaccurate, or whether they merely do not fully and correctly disclose the correct nature of the transactions.

Eric Paul, for Complainant.

J. Thomas Caldwell, for Respondents.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).<sup>\*</sup> An initial Decision and Order was filed on May 29, 1987, by Administrative Law Judge

<sup>\*</sup>See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1988 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Hall, *Agricultural Law*, ch. 71 (1987).



Dorothea A. Baker (ALJ) ordering respondents to cease and desist from engaging in business without maintaining a reasonable bond or its equivalent; failing to deposit in their custodial account, within regulatorily-imposed times, amounts equal to the proceeds due consignors for livestock purchased by respondents, and amounts equal to outstanding proceeds receivable due from other purchasers of livestock; failing to otherwise maintain their custodial account in strict conformity with the regulations; and permitting employees engaged in actual conduct of respondents' auction sales to purchase livestock out of consignment for speculative resale.

The order requires respondents to keep and maintain true and correct records.

The order suspends respondent Crockett for 6 weeks, and thereafter until it demonstrates that the custodial account shortage has been eliminated; provided, that when this shortage is eliminated, a supplemental order will be issued terminating the suspension, after the 6-week period.

The order suspends respondent Cobb as a registrant under the Act for 6 weeks. The order assesses a civil penalty of \$5,000, jointly and severally, upon respondents Crockett and Cobb.

On June 29, 1987, respondents appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>7</sup> On August 3, 1987, complainant filed a reply to respondents, which also contains a cross-appeal concerning the recordkeeping violation alleged in ¶ 6 of the complaint. The case was referred to the Judicial Officer for decision on September 2, 1987.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondents, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, with changes or additions indicated by brackets, and omissions indicated by dots. The effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

#### ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION Preliminary Statement

This is an administrative disciplinary proceeding instituted under the Packers and Stockyards Act, as amended (7 U.S.C. § 181 *et seq.*) (sometimes herein referred to as the "Act"), by reason of a complaint having been filed

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<sup>7</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted* in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

August 23, 1985, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that respondents willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*) (sometimes herein referred to as the "regulations"). The complaint was duly served upon the respondents and an answer was filed by respondents, Danny Cobb, and Crockett Livestock Sales Co., Inc., on September 19, 1985, admitting the jurisdictional allegations of paragraph 1 of the complaint, admitting other facts of the complaint, except as to some of the allegations pertaining to a previously named respondent, Thomas W. Horner, Jr.,<sup>1</sup> and denying that willful violations of the Act and the regulations had occurred by reason of such facts.

As they pertain to the above named respondents, the complaint alleges violations of the Act and regulations in that: (1) respondent Crockett engaged in the business of a dealer, buying and selling livestock in commerce, without maintaining an adequate bond or its equivalent; (2) respondents caused false and deceptive entries to be made on accounts of sale and custodial account checks; (3) respondent Crockett under the direction, management and control of Cobb, permitted respondent Horner to purchase consigned livestock for speculative purposes; and (4) respondent Crockett under the direction, management and control of Cobb, failed to maintain and properly use, Custodial Account for Shippers' Proceeds.

An oral hearing took place on July 8, 1986, in Memphis, Tennessee, before Administrative Law Judge Dorothea A. Baker. The complainant was represented by Eric Paul, Esquire, of the Office of the General Counsel, United States Department of Agriculture, Washington, D. C. 20250. The respondents Danny Cobb and Crockett Livestock Sales Co., Inc., were represented by J. Thomas Caldwell, Esquire, Caldwell & Fitzhugh, Jefferson Street, Ripley, Tennessee 38063. Both parties filed comprehensive briefs based upon the oral hearing and the case was referred to Administrative Law Judge for decision on January 14, 1987.

### Findings of Fact

1. Crockett Livestock Sales Co., Inc., hereinafter sometimes referred to as respondent "Crockett," is a corporation existing under the laws of the State of Tennessee, with its principal place of business in Maury City, Tennessee. Respondent Crockett's mailing address is P.O. Box 37, Maury City, Tennessee 38050.

2. Respondent Crockett is and at all times material herein was:

<sup>1</sup>The complaint originally named Thomas W. Horner, Jr. as a respondent herein. On May 19, 1986, a Decision and Order (upon admission of facts by reason of default) were issued with respect to Thomas W. Horner, Jr. This Decision and Order became final and effective November 4, 1986. Accordingly, Thomas W. Horner, Jr. is no longer regarded as a respondent herein inasmuch as the matters pertaining to him have been disposed of in the aforesaid decision.

(a) engaged in the business of conducting and operating the Crockett County Sales Company Stockyard located in Maury City, Tennessee, a stockyard posted under the Act, hereinafter sometimes referred to as the Maury City Stockyard;

(b) engaged in the business of conducting and operating the Crockett County Sales Company Stockyard located in Scotts Hill, Tennessee, a stockyard posted under the Act, hereinafter sometimes referred to as the Scotts Hill Stockyard;

(c) engaged in the business of selling livestock on a commission basis at the Maury City and Scotts Hill Stockyards, and buying and selling livestock in commerce for its own account; and

(d) registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce.

3. Mr. Danny Cobb, hereinafter sometimes referred to as respondent Cobb, is an individual whose mailing address is P.O. Box 37, Maury City, Tennessee 38050.

4. Respondent Cobb is and at all times material herein was:

(a) president of respondent Crockett;

(b) owner of 100 per cent of the outstanding stock of respondent Crockett; and

(c) responsible for the direction, management and control of respondent Crockett.

5. Commencing on October 8, 1984, Mr. Keith Ingram, a supervisory auditor with the complainant's Memphis Regional Office, and Mr. Robert Davidson, a marketing specialist from the same office, conducted an investigation to confirm respondents' compliance with the Packers and Stockyards Act.

6. During the course of this investigation, it was determined that respondents had entered into a one-year lease of a second auction market facility located at Scotts Hill, Tennessee, and had commenced operations under respondent Crockett's name without amending its registration as to place of business and increasing its market agency Clause 1 and dealer Clause 2 bond coverage. Respondent Cobb requested that Mr. Ingram and Mr. Davidson determine what bond coverage was required for compliance with the regulations.

7. Section 201.29(a) of the regulations expressly states that . . . No market agency, . . . or dealer . . . shall conduct its operations unless there is on file and in effect a bond complying with the regulations in this part. (9 C.F.R. § 201.29(a)).

8. Respondent Cobb was orally advised, following review of the relevant business records for both facilities, that respondent Crockett's current market agency bond requirement (Clause 1) was at that time \$60,000.00 and his current dealer bond requirement (Clause 2) was then \$50,000.00, an unspecified amount of which was related to the volume of dealer business done at the Maury City location.

9. According to the official records maintained at the Memphis Region Office, respondent Crockett had, in effect, two trust agreements in the amounts of \$60,000.00 (Clause 1) and \$12,000.00 (Clause 2). Respondent Cobb was told to increase dealer bond coverage maintained by respondent Crockett from \$12,000.00 to \$50,000.00 to cure a \$38,000.00 inadequacy. The Clause 1 bond in the amount of \$60,000.00 continued to be adequate.

10. Respondent Cobb requested that the necessary forms be mailed to him so that he could satisfy both bonding requirements with new trust fund agreements secured by a \$110,000.00 irrevocable, transferable, standby letter of credit instead of separate certificates of deposit.

11. On October 24, 1984, the requested forms were mailed to respondents along with a letter providing written notice that a new \$50,000.00 bond was required to cover the dealer activities of the respondent Crockett at Maury City and Scotts Hill. This letter also gave instructions with respect to the proper completion of the enclosed bond forms and an application for registration required if respondents were to continue to conduct dealer activities under the name "Danny W. Cobb Trading Account."

12. The parties are not in agreement as to when respondents were notified as to inadequate bond coverage. Complainant relies upon oral conversations in October, and a letter of October 24, 1984, enclosing requested forms. Respondents rely upon the written notification of January 10, 1985. Despite the October 24, 1984, letter and the prior oral notice, respondents failed to obtain and file the necessary \$50,000.00 dealer bond<sup>2</sup> or approved bond equivalent and complainant followed up with a second written notice dated January 10, 1985. In addition, complainant's marketing specialist, A. Davidson, spoke with respondent Cobb by telephone on December 3, 1984, December 10, 1984, and January 10, 1985. He also spoke with an insurance agent contacted by respondent Cobb, Mr. Jim Elkins of Elkins Insurance Agency, and kept contemporaneous notes of both sets of telephone conversations which he subsequently reduced to a signed memorandum of conversations.

13. The trust fund agreements maintained by respondent Crockett were required to comply with § 201.27(b) and (c) of the regulations, which read as follows:

(b) A bond equivalent may be filed in lieu of a bond. A bond equivalent shall be in the form of a trust fund agreement based on funds actually deposited and readily convertible to currency in the amount required by § 201.30. Such funds shall be invested or deposited, in the name of a trustee as set forth in § 201.32, in: (1)

<sup>2</sup>This is so even if the respondents terminated the Scotts Hill business as of March 31, 1985.

Fully negotiable obligations of the United States, or (2) deposits or accounts insured by the Federal Deposit Insurance Corporation of the Federal Savings and Loan Insurance Corporation. The provisions of §§ 201.27 through 201.34 shall be applicable to such trust agreements.

(c) Bonds and trust fund agreements shall be filed on forms approved by the Administrator. (9 C.F.R. § 201.27(b) and (c)).

14. Section 201.34(c) of the regulations further provides that prior to release of the pledged collateral, the trust fund agreement must be terminated as follows:

(c) Each trust fund agreement shall contain a provision requiring that, prior to terminating such trust fund agreement, at least 30 days notice in writing shall be given to the Administrator, Packers and Stockyards Administration, U.S. Department of Agriculture, Washington, D.C. 20250, by the party terminating the trust fund agreement. Such provision may state that in the event the principal named therein files an acceptable bond written by an approved surety to replace the trust fund agreement, the 30-day notice requirement may be waived and the trust fund agreement will be terminated as of the effective date of the replacement bond.

The complainant maintains that respondent Cobb obtained the release of both certificates of deposit which were pledged, pursuant to trust fund agreements without prior termination of such trust fund agreements in accordance with the regulations. Complainant maintains that this was either accomplished on September 23, 1983, or in December 1984.<sup>3</sup>

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<sup>3</sup>The exact date of the release of such certificates of deposit has not been reliably established on the record. The position of the complainant as set forth at the oral hearing was that the complainant regretted that it had not sought earlier information with respect to the trust fund agreement certificates of deposit (Tr. 184). At the time of the oral hearing, the complainant did not have this information. Its explanation was that if the certificates of deposit had been released in December 1984, there was still a significant period of bond inadequacy.

On the morning of the hearing, the complainant's investigator asked the Bank for data relating to whether or not the certificates of deposit were pledged as security or if both of the trust fund agreements had been released. The Bank declined to respond thereto because of the Right to Privacy Act. This was done on the morning of the hearing and the complainant's attorney requested: "Mr. Paul: Your Honor, I am going to request leave to file as a late filed exhibit in this proceeding information records obtained from this Bank pursuant to an administrative subpoena which I will cause to be issued by the administrator on my return to Washington requiring the Bank to produce these records, and I believe that they would be directly, have direct bearings as to the amount of bond coverage actually in effect during the relevant time period covered by this complaint (Tr. 177).

The respondents' attorney objected to this request and sought either a recessed hearing or an opportunity to respond thereto. It was noted that the hearing had been set for a number of weeks.

The respondents made timely objection to the introduction of proposed Exhibit 12 at the oral hearing (Tr. 185) on the grounds of surprise, on the grounds of attempting to introduce

(continued...)

15. The complainant suggests that although its proposed Exhibit 12, which was not admitted into evidence, provides a more reliable date with respect to the release of the certificates of deposit, nevertheless, the complainant argues that either the date of September 23, 1983, or December 1984 is sufficient to establish willful impairment of the required bond coverage by respondents. In particular, the complainant relies upon the testimony given by Mr. Cobb:

Q Mr. Cobb, you agree with me that you had a trust fund agreement in the amount of twelve thousand and another trust fund agreement in the amount of sixty thousand and that you subsequently obtained a surety bond in the amount of sixty thousand and another surety bond in the amount of twenty thousand?

A That's correct.

Q What happened to those two trust fund agreements? What did you do with them?

A I got the money. What would you do with them?

Q When did you get the money?

A When we changed our business we moved our business from one bank to another when we terminated that. We just did it all at one time.

Q When did that occur?

A I have no idea. Sometime the latter part of December 1984. I do not know the date of it, I will be honest with you. I could have gotten the date. If they had called me I would have been more than glad to get it for them. Why they didn't call me instead of calling the bank, I do not know. I had furnished them all the other information. (Tr. 244-245)

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(...continued)

evidence of matters outside the complaint, on the grounds of hearsay, on the grounds that they had no opportunity to rebut the hearsay document, and that the matter was not brought to the attention of respondents' counsel by complainant's pleadings or at a pretrial conference. It is obvious that the respondents had no opportunity to cross-examine with respect to said proposed Exhibit 12, to refute the same, to explain, or to contradict said document.

Notwithstanding this denial of the complainant's request at the oral hearing, the complainant filed a motion after the close of the hearing for entry of complainant's Exhibit 12 being a letter received from the trustee on July 11, 1986, three days after the close of the oral hearing which letter indicates that the certificates of deposit were released on September 23, 1983. For the same reasons given at the oral hearing, the complainant's request to enter Exhibit 12 into evidence was denied.

16. Effective April 16, 1985, respondents filed a surety bond in the amount of \$20,000.00 issued by the Insurance Co. of North America to cover the dealer operations (Clause 2) of respondent Crockett. This bond was filed after the respondents had terminated the lease of the Scotts Hill facility on March 31, 1985. Based on the dealer volume reported for the fiscal year ending March 31, 1985, at the Maury City location, this bond satisfied the reduced dealer bond requirement that existed as of April 1, 1985.

17. Respondents also filed a new market agency (Clause 1) bond effective June 27, 1985, in the amount of \$60,000.00. Complainant has not alleged any violation with respect to the Clause 1 coverage.

18. The weight of the persuasive evidence of record indicates that from October 15, 1984, to on or about March 31, 1985, respondents operated without a bond, or approved bond equivalent, in effect that complied with the bonding requirements. A number of attempts were made to obtain dealer bond coverage, and although one bond in the amount of \$35,000.00 was submitted sometime after January 10, 1985, this bond was in the name of a proposed partnership that was never registered to conduct business at Scotts Hill, and was returned unfiled when the proposed partnership fell through and the respondents terminated any connection with the Scotts Hill facility.

19. The continued operation with impaired and inadequate bond coverage by respondents Cobb and Crockett was an unfair practice and was willful and intentional. The position of the Department is that a violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts in careless disregard of the statutory requirements. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1982).

20. The respondents rely upon the notification letter of January 10, 1985,<sup>4</sup> notifying respondent Crockett as to the necessity of the increase of the Clause 2 bond coverage and assert that after such notification an effort was made to comply with such bonding requirements but that there were continuous problems occurring and that on March 31, 1985 Crockett terminated the Scotts Hill business.

21. Further, the respondents maintain that they had sufficient bond coverage prior to engaging in business at Scotts Hill. The evidence is unclear as to whether Crockett began the Scotts Hill business on August 1st or August 10, 1984. However, it is clear that respondents did engage in business from one of those August dates until March 31, 1985.

22. The respondents maintain that the Scotts Hill market was first operated under the bond of Mr. Ewell Gibson by reason of a lease agreement. This is without merit. The dealer livestock buying operations conducted at Scotts Hill in August, September, and October 1984 were not covered by the former operator's bond, and did not become applicable to the operations of respondent Crockett under any circumstances.

<sup>4</sup>Respondents indicate that upon notification of the bond needed on January 10, 1985 and, being unable to comply therewith, Crockett terminated the Scotts Hill business on March 31, 1985.

23. Moreover, the \$38,000.00 inadequacy in the respondents' dealer coverage was not attributable solely to their new dealer operations at Scotts Hill facility. The \$50,000.00 dealer bond requirement of respondents were notified October 10, 1984 was based upon the total value of dealer livestock purchases made using "Danny W. Cobb Trading Account" checks at Maury City, as well as at Scotts Hill. Only part of this increase was attributable to the purchases made at Scotts Hill, Tennessee.

24. Even disregarding the withdrawal of the \$12,000.00 certificate deposit to the dealer trust fund agreement on file with the Secretary, effectively eliminated all coverage then filed, dealer bond coverage remained inadequate for a full 6 months between the initial oral notification at filing of a satisfactory Clause 2 bond effective April 16, 1985. This satisfied a reduced \$20,000.00 bond requirement established by respondent's annual report for the fiscal year ended March 31, 1985. Respondents complied with their \$50,000.00 dealer bond requirement while requirement remained in effect.

25. As of the date of the oral hearing (July 8, 1986) Crockett's Clause 1 and Clause 2 bonds were of the proper amount.

26. The evidence shows that respondents Cobb and Crockett knowingly operated without the required amount of dealer bond coverage during the period October 10, 1984, to March 31, 1985.

27. The persuasive and convincing evidence of record indicates that respondents were in violation of the Act and the regulations with respect to their bond coverage, and that the sanctions sought by complainant should be imposed.

28. The evidence shows that as of August 28, 1984, respondent Crockett had outstanding checks drawn on its custodial account in the sum of \$88,888.36, and had to offset those checks, cash in its custodial account in the amount of \$22.36 and current proceeds receivable in the amount of \$33,000.00 resulting in a deficiency of \$55,784.86 in funds available to pay shippers' proceeds.

29. Respondent Crockett had as of September 29, 1984, outstanding checks drawn on its custodial account in the amount of \$198,668.94, and had to offset those checks, cash in its custodial account in the amount of \$100.00 and current proceeds receivable in the amount of \$71,533.91 and deposits in transit in the amount of \$71,494.30, resulting in a deficiency of \$55,620.00 in funds available to pay shippers their proceeds.

30. The respondents assert that the bank statements did not show a deficiency in Cobb's custodial account and that the audit performed by complainant could not ascertain whether or not the checks designated as outstanding had in fact been mailed. Respondents would detract from the compilations taken from the bank statements and accounts by showing that the bank statements did not show dollar deficiencies in the custodial account. However, the evidence shows otherwise and respondents' contentions do not persuasively detract from the validity of the complainant's position that as of August 28, 1984, and September 29, 1984, there were existing deficiencies in the custodial account.



31. The accuracy of outstanding checks and custodial account balances as set forth herein, are the same as those alleged in paragraph 111(a) and (b) of the complaint and were admitted in respondents' answer. Respondent Danny Cobb, however, denied by answer and by oral testimony that such facts established the existence of a failure to maintain and use properly respondent Crockett's custodial account. The essence of his testimony was that no real deficiency actually existed and that no livestock consignor had been endangered or not paid by respondent Crockett. It was respondent Cobb's position that the consignors were fully protected by accounts receivable and by a line of credit. Respondents introduced evidence that the amount of this line of credit was \$250,000.00 when it was established with the Bank of Alamo on November 30, 1984, and that the balance thereon, as of July 8, 1986, was \$132,001.50. Respondent Cobb had previously represented the dollar amount of his line of credit as being \$75,000.00 in a telephone conversation with an agency employee, Mr. Robert Davidson, on December 3, 1984.

32. Section 201.42 of the regulations promulgated under the Packers and Stockyards Act, as amended, provides, *inter alia*, in subsection (a) that custodial accounts are trust funds; in subsection (b) that every market agency establish and maintain a trust fund designated as "Custodial Account" to disclose the account's fiduciary nature; and, in subsection (c) that the market deposit in its custodial account before the close of the next business day following sales, all proceeds collected from sale of livestock, the amounts due from the market or its agents, and credit buyers, and, the markets must deposit all remaining proceeds receivable by the close of the seventh business day following the sale, whether or not the proceeds have been collected.

33. As is set forth more fully hereinafter, some of the amounts due the custodial account were attributable to matters relating to Mr. Thomas Horner.<sup>5</sup> However, in this regard, the respondents argue that the difference in "accounts receivable" and "proceeds receivable" is set forth in the evidence and that receivables outstanding up to seven days are "proceeds receivable" and are a part of the custodial account. After seven days, such receivables become "accounts receivable" and are transferred to a market agency's general account.

34. A disagreement between the parties with respect to the analysis of the August 31, 1984, bank statement is best resolved by a reference to the figures involved. Pages 9 and 10 of complainant's Exhibit 5 show all entries posted for August 28, 1984, through August 31, 1984, with an absence of any transactions involving the custodial account on August 29, 1984 (the day of the sale). The \$30,704.88 balance shown above the first entry for August 28, 1984,

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<sup>5</sup>The August 28, 1984, reconciliation also showed that the custodial account had not been credited with the amount of \$53,361.96 which represented receivables from buyers to whom the respondents had extended credit. Included in that amount was \$8,452.19 representing a receivable with respect to Mr. Thomas Horner.

With respect to the reconciliation of the respondents' custodial account as of September 29, 1984, there was shown to exist accounts receivable in the amount of \$33,048.97 for which the custodial account had not been reimbursed. Of that amount \$8,283.99 was attributable to Mr. Thomas Horner.

is the opening balance for this date to which was added the single \$5,708.44 leaving a balance of \$36,413.32 available for the payments and debits. The 25 checks and debits posted before the subsequent date for which a transaction was posted, August 30, 1984, is \$16,390.96 and the balance left, \$22.36, is the closing balance for the account on August 28, 1984. The complainant's supervisory audit program determined from the respondents' check register and numerical custodial account checks that outstanding checks totaling \$88,888.36 exist August 28, 1984.<sup>6</sup>

35. Mr. Keith Ingram explained the method whereby he determined custodial account shortage of \$55,784.86. Such explanation was:

Q How did you determine that [with respect to the reconciliation on August 28, 1984]?

A Determined that by taking all the outstanding checks and putting that against what we considered debits to the account, the bank balance, any proceeds receivable, deposits in transit, certificates of deposit, designated as custodial funds, savings accounts designated as custodial funds and proceeds receivable which are receivables within seven days' duration of the last sale.

Q And of that group of debits what ones were actually found to exist at that date?

A A balance per bank statement, \$22.36, current proceeds receivable of \$33,081.14.

Q And referring to page two and three, what is the nature of these two pages?

A It is a copy of the bank statement in which the custodial account is located of Bells Banking Company. They are selected pages illustrating the -- the first page illustrates the date of August 28 in the lower righthand corner and transactions for that date continue on to the following page, and we have a balance there at the close of

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<sup>6</sup>An argument advanced by the respondents is that their line of credit with the Bank precluded any real deficiency in its custodial account. This has been considered by the Department's Judicial Officer and has been found to lack merit with respect to failure to comply with the requirements of a substantive regulation. Market agencies and dealers must comply fully with the Act and regulations, and not do so only to the extent of their subjective judgment. The existence of a line of credit must be disregarded in determining whether a custodial account is in balance. *In re Arab Stock Yard Inc., infra*; *In re Sechrist Sales Company, Inc., infra*; *In re Hardy*, 33 Agric. Dec. [1383,] 1398-1406 (1974); *In re Bowman*, 23 Agric. Dec. 1065 (1964); *In re Shannon*, 7 Agric. Dec. 951 (1948). The rationale of the requirement for compliance with the regulations is that such a line of credit is not protected by the Federal Deposit Insurance Corporation; is not specifically earmarked as a custodial account; and the Bank does not regard such line of credit as such. Accordingly, such line of credit could be subject to attachment by creditors or diminishment by other matters such as insolvency of the Bank itself.

business on that date of \$52.56, which is the same amount as shown on page one.

Q So that would be the balance as of the date of your reconciliation?

A That is correct.

Q And page four, what is that schedule?

A The schedule of the proceeds receivable as of August 28, 1984, for sales, for purchases by buyers of sales during the previous seven days.

Q These would be purchases within seven days that have not yet been paid?

A That's correct. Let me clarify that a little bit. Other employees or owners or people who were extended credit. That would be the requirement that those would be reimbursed the following day after purchase.

With respect to the custodial account analysis as of September 29, 1984, Mr. Ingram explained:

A Page one is a custodial account analysis as of September 29, 1984, which I prepared from the records of Crockett Livestock Sales Co., Inc. That shows debits to the account of \$143,048.86, less credits, including outstanding checks, made solely of outstanding checks, of \$198,668.94 or custodial account shortage of \$55,620.08.

Q What did the debits consist of?

A Balance per bank statement, \$20.65; deposit in transit, \$71,494.30; and current proceeds receivable, \$71,533.91.

Q What are deposits in transit?

A Deposits in transit are items that were deposited in the bank as of the day of the analysis but did not appear on the bank statement. Apparently they were deposited after the cut-off at the bank.

Q And turning to page two, what is the nature of that document?

A It is a copy of the custodial account bank statement as of September 29, 1984.

Q And with respect to page three and four, what is the nature of that schedule?

A Page three is a schedule I prepared of the custodial account deposits in transit as of September 29, 1984. These are items that were collected as of the 29th, deposited to the bank account on September 29th but did not appear on the September 29th bank account statement.

36. Whether or not the checks were mailed is not of material importance inasmuch as a delay in the mailing of issued custodial checks would have unfairly delayed their presentation for payment, in violation of §§ 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228(b)), but would not have decreased the amount of the custodial account deficiency.

37. Under the regulations promulgated pursuant to the Act the respondents had an obligation to promptly reimburse the custodial account by the close of the next business day for all purchases by an employee or by a buyer who has been extended credit. The respondents have not successfully challenged the validity of complainant's custodial account analyses.

38. Respondents Cobb and Crockett had been placed on written notice as to the custodial account requirements in general, and as to having violated the Act and the regulations on three dates in 1981, by reason of custodial account shortages.

39. The custodial account shortages of \$55,784.86 and \$55,620.08 were caused in part by respondents extending credit to and financing of, the purchases from consignment of Mr. Horner, and by respondents' failure to timely reimburse the custodial account with funds equal to the outstanding proceeds receivable due from other purchasers of consigned livestock. In other words, there was a failure of respondents, through a continuing practice, to reimburse the custodial account for delinquent accounts receivable. The complainant had shown by credible evidence that the respondents violated § 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), by failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed by said regulations, amounts equal to the proceeds due consignors for livestock purchased by respondents, their agents or employees, and amounts equal to the outstanding proceeds receivable due from other purchasers of consigned livestock.<sup>2</sup>

40. Paragraph IV of the complaint charges that respondent Crockett had employed Mr. Thomas Horner as a ringman and had permitted Mr. Horner to purchase livestock for speculative purposes in violation of §§ 307 and 312(a) of the Act and § 201.56(b) of the regulations.

<sup>2</sup>It should be noted herein that although there was oral testimony to the effect that the custodial account was in balance as of the time of the oral hearing, this is not sufficient to establish that this fact did exist although it may have. It would have necessitated an audit by the Packers and Stockyards Administration's employees in order to make such a determination.

41. The persuasive evidence of record does not support this charge of the complainant. It was not shown that Mr. Horner was an employee or that he was a key employee or that his purchases were illegal.

42. It is not unlawful for a ringman to buy cattle from out of consignment. For example, they can be bought for feeder purposes or breeder purposes.

43. Mr. Thomas Horner was not a regular employee at Crockett sales which did not have a regular ringman, and when Mr. Horner worked in the ring, it was without pay and in the same capacity as some other 50 gratuitous helpers. The persuasive evidence of record shows that Mr. Horner, along with approximately 50 other people from time to time acted as ringmen and during a sale there could be more than one "ringman." This was not a large sales activity and people who were sitting around would get up and help move the cattle into the ring and out of the ring.

44. The evidence does not show that Mr. Thomas Horner sold livestock on a regular basis at the Crockett County Livestock sale.

45. The evidence does not show that Mr. Thomas Horner purchased cattle from out of consignment for speculative purposes.<sup>8</sup>

46. The evidence does not show that the complainant was able to trace where specific animals bought by Mr. Horner at the Crockett livestock sales had been sold.

47. The evidence was insufficient to show what cattle were sold to Mr. Horner and what disposition was made thereof. There was testimony that Mr. Horner took some of the cattle to his father's farm.<sup>9</sup>

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<sup>8</sup>The evidence fails to show, firstly, the identity of the cattle (with a small exception) and, secondly, whether or not Mr. Horner was acting as ringman when such cattle were purchased. Both parties agreed there was nothing illegal in Mr. Horner purchasing the cattle. The test was whether Mr. Horner bought the cattle for speculative purposes and whether he was acting as ringman at the time. The complainant's witness, Mr. Davidson, acknowledged that:

Q Now, with respect to the supporting records that would indicate, from which you determined this purchase, were you able to trace the specific animals covered in these purchases to specific sales occurring in the respondent's Scotts Hill market?

A No, Sir.

Q So there were purchases on one date, sales on a corresponding or related dates, but they didn't have the same tag numbers or there was no way to specifically say an animal purchased on Wednesday was sold on Friday?

A I could not be positive, no.  
(Tr. 84)

<sup>9</sup>In addition, the agency's investigators were not able to say whether or not the cattle sold by Mr. Horner at Scotts Hill market were the same cattle which he had purchased from Crockett Livestock (Tr. 88). Mr. Horner bought cattle from various sources and sold them at various places. In addition he had breeding cattle and cattle on his own property and on his father's property as well as having utilized feedlots.

48. There is no evidence whatsoever that the respondents and Horner in anyway conspired or agreed in any fashion to gain profits from Horner's purchases.

49. The evidence fails to establish that Mr. Horner resold any of cattle itemized in the complaint for speculative purposes and fails to show there was a violation of § 201.56(d) as alleged in the complaint.

50. The essence of the complainant's argument with respect to purchases made by Mr. Horner was that Mr. Horner was operating a dealer, was an employee or a key employee of the respondents and although he may have been unpaid, he was receiving a benefit because he was required to pay interest on his account owed to the respondents. In addition, the complainant maintains that it does not have to establish specific identification of the cattle involved inasmuch as the respondents should have known that Mr. Horner was purchasing cattle for speculative purposes. With respect to the purchases of Mr. Horner, the evidence does establish that on the dates of August 28, 1984, and September 29, 1984, Mr. Horner had paid the respondents the amounts of \$8,452.19 and \$8,283.99, respectively, and owing as to those cattle which he purchased on the sale dates. Such amounts due and owing contributed to the deficiencies set forth above in custodial account.

51. The respondents, as a general practice, extended credit to buyers including Mr. Horner. The regulations required a prompt reimbursement to the custodial account, by the close of the next business day for all purchases by an employee, or by a buyer who has been extended credit. This would include Mr. Horner.

52. Paragraph VI of the complaint alleges, *inter alia*, that respondents issued false and inaccurate accounts of sale and custodial account checks for livestock purchased from consignment and that same failed to show the true and correct nature of the transactions, in violation of § 401 of the Act (U.S.C. § 221).

53. On brief, complainant maintains that such records of respondents "failed to reveal that respondent Crockett was the actual consignee of livestock." Complainant contends that, even though respondents use mechanically-imprinted name indicating "Crockett Sales Co." before the dollar amount figure, this is not sufficient indication of respondent Crockett as payee or consignor. The persuasive evidence of record does . . . sustain contention.["] [Either by design or by ineptitude, respondents' records ambiguous, and, thus, do not fully and correctly disclose all transactions.

54. Section 401 of the Packers and Stockyards Act states in part follows:

Section 401. Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the

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[Note that the word "not" is deleted from this sentence.]

accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than \$5,000, or imprisoned not more than three years, or both. (7 U.S.C. § 221).

55. In addition to the statutory requirement of § 401, the complainant maintains that it is not sufficient if the required information is present somewhere in the respondents' records that might have to be cross checked and that the purpose of § 401 of the Act (7 U.S.C. § 221) is to require full and correct disclosure to those involved in normal transactions *as well as to auditors employed by the complainant*. . . .

56. Using respondents' records, the complainant's agents were able to identify the original owner, place of origin, to whom they belonged, the sale date, the purchaser, how much was paid for them, and place of destination of every cattle lot listed in the complaint (Tr. 99).

57. The complainant neither furnished nor presented other manner or form of accounts and records to be used by respondents.<sup>10</sup>

58. The complainant has [shown][<sup>11</sup>] that the records maintained by the respondents were "false and inaccurate accounts. . . ." [Furthermore, there is a preponderance of the evidence that respondents' records "do not fully and correctly disclose all transactions . . ." as required by Section 401 of the Act (7 U.S.C. § 221). Thus, the recordkeeping provision sought by complainant is appropriate.]

### Conclusions

The complainant has not shown by convincing proof that Mr. Thomas Horner, no longer a respondent in this proceeding, purchased livestock while acting as a ringman for speculative purposes.

Mr. Horner was not an employee, and not a key employee, and his purchases were not illegal. The sale barn did not have a regular employee and when Mr. Horner worked in the ring, it was without pay and in the same capacity as many other gratuitous helpers. Mr. Cobb's testimony and explanation of this procedure is credible and corroborated:

Q . . . Did you ever pay Horner for operating as a ringman?

A. No, sir.

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<sup>10</sup>Nor was there any indication of a directive to respondents to make any specific changes in the records.

[<sup>11</sup>The ALJ's words "has failed to show" are omitted.]

Q Did not?

A I did not.

Q Did he operate as a ringman all the time?

A No, sir.

Q Did other people operate as ringman while he was up in the stand?

A That's correct.

(Tr. 208)

Q Mr. Cobb, through the course of your years there with Crockett County Livestock Sales, have you used several people to help you in the sale ring as a ringman?

A We use various and sundry people. Lot of times, you know, most of the farmers are in the field, or, you know, the regular men are not there. Somebody just stands in at the gate, help us out. We don't pay anybody to do it. We just have different people, you know, that do it. A lot of people enjoy doing it. It's a pleasure to get down in the ring and work. I know instances, not at our sale where a man is selling cattle come through where he can talk about them, tell people about them, you know, stuff like that. There is no such thing as a designated ringman, in my opinion, in our barn.

Q Not in your ring all the time. Not in your sale anyway?

A No, sir. I am the only man that's in that ring all the time.

Q And how many different people would you say that you had in that ring or acting as so-called ringman over the course of the years?

A Fifty.

(Tr. 94)

The complainant's witnesses were not able to say that Mr. Horner sold livestock on a regular basis at the Crockett Livestock Sales. Nor, were they able to trace where specific animals bought by Mr. Horner at the respondent facility had been sold:

Q Did you know what cattle they were?

A I don't know what cattle and I don't think anybody can prove that he bought cattle at my sale and carried them to another sale.

Q Did he have cattle at his father's farm?



A. They had cattle on their farm. I have got records where I bought their cattle to get back even one time. (Tr. 209)

With respect to the purchases by Mr. Horner the complainant maintains that it does not have to establish specific identification of the cattle to prevail in light of the fact that complainant maintains it has established by the evidence a general practice on the part of respondents. Complainant relies upon the alleged observations of the respondents, particularly respondent Cobb, as to what he observed of Mr. Horner's daily activities which complainant argues was sufficient to put him on notice that Mr. Horner was buying for speculative purposes. However, the complainant goes on to state among other things on brief, that:

"The length of suspension sought and the amount of civil penalty sought in this proceeding is not directly related to the number of specific speculative transactions established. Accordingly, the violation alleged may properly be established to have occurred on a general basis." *In re Hines*, 35 Agric. Dec. 113 (1976).

The weight of the evidence fails to sustain the argument of the complainant that respondents Cobb and Crockett permitted Mr. Horner, while working as a ringman on a regular weekly basis, to purchase consigned livestock, and to resell a substantial but undetermined amount of such livestock in speculative transactions. The allegations of the complaint are not sustained.

Paragraph VI of the complaint alleges that respondent Crockett had issued false and inaccurate accounts of sale and custodial account checks for livestock purchased from consignment, and that the market's records failed to show the true and correct nature of the transaction. This was charged to be in violation of Section 401 of the Act:

Sec. 401. Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. *Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than \$5,000 or imprisoned not more than three years or both.* (7 U.S.C. 221 (See Sec. 503.)) (Emphasis Supplied)

The evidence shows herein with respect to the accounts and records sustained by the respondents that the complainant's auditors complained at they had to look in more than one place in order to acquire the

information relative to the transactions of the respondents. However, is shown, in the evidence, given by the complainant's witnesses, that, i they were able to determine the original owner, place of origin, sale purchaser and destination of the cattle sold by using the respondents' re

The records taken from respondent Crockett contained such inform as was necessary to . . . ['] disclose all transactions involved in the bu [However, many individual records were kept in such a manner as to be and inaccurate.] The Packers and Stockyards Administration's complain not that respondent Crockett's records were inadequate, but that he ha livestock in the name of the producer, rather than in the name of Cr Livestock Sales. Witness Davidson made this clear in the following testi

Q And I ask you doesn't [sic] these records that you got as Numh 10, all this A through L, doesn't that completely enable you to do the

A To trace them, you say?

Q Yes, sir, trace them from any place he bought them, who he bwing them from, where he sold them, how much he sold them for, and . on; isn't that right?

A Yes sir, but it doesn't show the correct name under which it shou have been shown.

Q All right, sir. We will get to that in a minute. But I am asking y once again -- I just read this Act to you, what it requires him to do.

A Well, it does, yes, sir.

Q Okay, Then what is your complaint about these records, Mr. Davidson?

A Because the actual dates that the auction market agency, stockyard owner, packer, dealer, must state in their records the true, ful accurate ownership of livestock in each transaction.

Q Does it show that?

A They were consigned in somebody else's name besides Crockett Livestock.

Q Excuse me, but how did you come in here and testify to the Court without objection from me that you found out that they belonged to Danny Cobb, Crockett Livestock Sales? You asked him everything He presented all these records to you and you didn't have a bit o trouble determining that, did you?

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[\*Note that the word "completely" is deleted.]

A I found it his records, yeah.

(Tr. 93, 98)

The respondents showed that in order to comply with the brucellosis program administered by the Tennessee Department of Agriculture the name of the consignor was also indicated in order to be able to trace and identify the cattle under the brucellosis program administered by the Tennessee Department of Agriculture. There is no reason to disbelieve that. [But there was no need to create false and inaccurate records in order to comply with the brucellosis program.]

The complainant [correctly] argues that the location of the information in the respondents' records [and the accuracy of the records] is relevant and important. . . . [The] statutory . . . requirement in this regard [is that part of Section 401 of the Act (see Finding 54) which requires that every stockyard owner keep such records as fully and correctly disclose all transactions involved in his business. . . . Thus,] the complainant's evidence does . . . ['] sustain its contention that its auditors had to resort to numerous records that were pieced together like a puzzle after painstaking investigation.<sup>11</sup> [There is no reason to disbelieve that.]

It is noteworthy that, on brief, the complainant states:

"However, as violation of section 213(a) *has not been alleged* with respect to the false record allegations of paragraph VI of the complaint, the complainant does not request the imposition of a civil penalty, suspension, or cease and desist provision for these violations. Complainant seeks the appropriate affirmative recordkeeping provision pursuant to section 401 (7 U.S.C. § 221)." (Emphasis Supplied)

The complainant has . . . ['] sustained its allegations with respect to the lack of maintenance of records by respondents [, to the extent that respondents' records do not fully and correctly disclose all transactions].

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[Note that the word "not" is deleted.]

<sup>11</sup>Using respondent Crockett's records, complainant's agents were unable to trace the original owner, place of origin, the sale date, purchaser and place of destination of every cattle lot listed in the complaint [, albeit with great difficulty].

The employees of the Packers and Stockyards Administration neither furnished nor presented in any manner or form of accounts and records to be used by respondent Crockett. They further indicated at the oral hearing that these matters had apparently been corrected.

There was . . . [The ALJ's word "not" is omitted] convincing proof of "false and inaccurate accounts" maintained by the respondents. [In any event, respondents' records are such that the second sentence of § VI of the complaint would apply, because the accounts of sale and custodial account checks did not fulfill the requirement that the full, true and correct nature of all transactions be revealed.]

[ The ALJ's word "not" is omitted.]

The next issue to be addressed concerns the allegation by the complainant that respondent Crockett, under the direction, management and control of respondent Cobb, failed to maintain and use properly its Custodial Account for Shippers' Proceeds, thereby endangering the faithful and proper accounting therefor and payment of the portions thereof due the owners and consignors of livestock in that:

(a) As of August 28, 1984 respondent Crockett had outstanding checks drawn on its custodial account in the amount of \$88,888.36 and had, to offset those checks, cash in its custodial account in the amount of \$22.36, and current proceeds receivable in the amount of \$33,081.14, resulting in a deficiency of \$55,784.86 in funds available to pay shippers their proceeds.

(b) As of September 29, 1984, respondent Crockett had outstanding checks drawn on its custodial account in the amount of \$198,668.94 and had, to offset those checks, cash in its custodial account in the amount of \$20.65, and current proceeds receivable in the amount of \$71,533.91, and deposits in transit in the amount of \$71,494.30, resulting in a deficiency of \$55,620.08 in funds available to pay shippers their proceeds.

(c) These alleged deficiencies were caused, in part, by the misuse of the custodial account by respondents Crockett and Cobb through extending credit to, and financing the purchases from consignments by one of their employees, respondent Horner (with respect to whom a default decision became final on November 4, 1986), and by failure of respondents Crockett and Cobb to reimburse the custodial account within the time prescribed by the regulations, with funds equal to the outstanding proceeds receivable due from other purchasers of consigned livestock.

The respondents maintain that the complainant failed to show that violations set forth above occurred and that the complainant failed to carry its burden of proof. Specifically the respondents maintain that the complainant has not shown by persuasive evidence, and for reasons set forth in its brief, that there were shortages in the custodial account on August 28, 1984 and September 29, 1984. The contention pointed out by the respondents particularly on cross-examination (Tr. 45-48), is understood by the Judge to depend principally upon the difference between proceeds receivable and accounts receivable. These respondents carried a number of their buyers' accounts receivable status. The testifying witness Mr. Ingram was directed by his attention to "proceeds receivable" from the prior sales and maintained in that position (apparently adhered to by the Judicial Officer)<sup>12</sup> that the amount which could have been credited to the custodial account, which was

<sup>12</sup> Cf. *In re* Spencer Livestock Commission Co., 46 Agric. Dec. 268 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

have cured this deficiency, would have been what the witness referred to as "proceeds receivable." Apparently the witness was relying upon the statutory language which uses such terminology. On the other hand, the respondents were not in a position to understand why (1) the investigator did not take into account the allowable seven days within which the respondents could have achieved balance in the custodial account, and (2) why, if, within that seven-day period a check had been written for the shortages, such action would not have alleviated any violation. The position of the auditor was that even if he had permitted the respondents the full seven days to reimburse the custodial account the only amounts which could have been used to have achieved such purpose and to have prevented violation of the Act, would have been a reimbursement of the "proceeds receivable." This is somewhat theoretical since it was not done.

The evidence of record indicates that custodial account shortages are considered to be serious violations because the custodial account is a trust account for livestock producers to assure that they get their money for the livestock sold on a commission basis through the auction market where the market agency is selling on commission. If handled correctly, such account is insured for each consignor up to \$100,000.00 by the Federal Deposit Insurance Corporation [FDIC]. . . . [That is the way in which FDIC insures trust accounts.] If the money is in the market account, it is only insured for \$100,000.00 total rather than for each consignor. Thus, by proper handling of the custodial account the producer has a greater amount of protection. Also, for this reason [among others], a line of credit, which admittedly the respondents had, cannot meet the custodial requirement because the line of credit would not be a part of the account and would not be covered by the Federal Deposit Insurance Corporation insurance for each consignor (Tr. 149-150).

Moreover, the respondents argue that the complainant is attempting to show a continuing course of conduct, apparently, over a period of months and years, as opposed to failure to deposit to the custodial account the proper amount of receivables during the required period. It is not necessary for complainant to go beyond the averments of the complaint to show that the custodial account was not being properly handled.

In addition, the respondents argue that based upon the oral testimony of one of its witnesses, its custodial account was currently correct as of July 8, 1986.

These [same] arguments have been considered [in many other, similar proceedings] by the Department's Judicial Officer, the final deciding authority for the United States Department of Agriculture.

By letter dated October 18, 1978, respondents were placed on notice of the custodial account regulations promulgated by the Secretary, 9 C.F.R. § 201.42. It was specifically noted therein that the custodial account had to be reimbursed by the close of the next banking business day for purchases made by a buyer to whom credit had been extended. A second letter dated October 27, 1978 was also sent to respondents relative to violations of section 201.57 of the regulations and sections 307 and 312(a) of the Act. On September 16,

1982, a letter was sent to respondent Crockett relative to the amendments (effective August 30, 1982) to section 201.42 of the regulations.

For reasons set forth herein it is found that the complainant did establish custodial account shortages on August 28, 1984 and September 29, 1984. According to established precedent, set forth in the Agricultural Decision, a presumption exists that a custodial account deficiency existing on two or more dates is presumed to continue until affirmatively shown otherwise. Once a shortage exists, the burden is upon respondents to prove the existence of a properly restored custodial account with more than essentially unsupported oral testimony. However, as a practical matter, the agency, prior to finding that the custodial account is in balance, usually performs an investigatory audit prior to such determination. In any event, it is immaterial to this proceeding as to whether or not the respondents' custodial account was in balance on July 8, 1986, inasmuch as the allegations of the complaint are directed to the August and September dates in 1984.

Respondents' argument must fail to the effect that their custodial account obligations are limited to proceeds receivable and that when a buyer is allowed at least seven days credit, only an account receivable is produced which may be freely deposited into the market's general account without violating 9 C.F.R. section 201.42. The position of the complainant that the respondents failed to maintain and properly use their custodial accounts is fully supported by the decisions of the Department's Judicial Officer.

Every market agency selling livestock on commission is required to establish and maintain a Custodial Account for Shippers' Proceeds which is a trust account and the proceeds generated by the sale of consigned livestock are trust funds. *In re: Miller*, 33 Agric. Dec. 53 (1974), *aff'd sub nom. Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974). As noted by the complainant on brief, the failure of the market agency to maintain its custodial account in accordance with the requirements of section 201.42 is a violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), as well as a violation of section 201.42 of the regulations. *In re: Arab Stock Yard, Inc.*, 37 Agric. Dec. 293 (1978), *aff'd (mem.)*, 582 F.2d 39 (5th Cir. 1978); *In re: Sechrist Sausage Company, Inc.*, 36 Agric. Dec. 665 (1977); *In re: Hardy*, 33 Agric. Dec. [138-1398-1406 (1974)].

In addition, there have been more recent cases wherein the Judicial Officer has found that custodial accounts maintained for the protection of shippers who consigned livestock for sale were shown to have been in a state of substantial deficiency on a regularly reoccurring basis and one of the principal causes of these deficiencies was found to be the failure to deposit into the custodial accounts by the close of the next business day an amount equal to the proceeds receivable from livestock purchases made by the respondents or by a dealer to whom credit had been extended. This practice, which is closely related to the causes of the custodial account shortages in the present proceeding, was found to constitute a willful, deliberate, and flagrant violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and of section 201.42 of the regulations. *In re: Farmers and Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. [234 (1986)]. See, also the recent decision of March 1986, *In re: Blackfoot Livestock Commission Co.*, 45 Agric. Dec. [590 (1986)].

*aff'd*, 810 F.2d 916 (9th Cir. 1987)), wherein the Judicial Officer, the Department's deciding authority, stated among other things that consignors were entitled to rely on the market's compliance with the regulations promulgated under the Packers and Stockyards Act to ensure that their funds were being properly safeguarded in a custodial account.

Another recent case is that of *In re: George County Stockyard, Inc. and M. H. Pitts*, [45 Agric. Dec. 2342 (1986)], wherein it was stated that the improper handling and use of Shippers' Proceeds violates the integrity of the Custodial Account for Shippers' Proceeds and the regulations promulgated to preserve it. Improper handling and use of the custodial account are plainly contrary to the Act and the regulations. That case also addressed the contention with respect to the argument of a lack of evidence that any particular shipper had not been paid. Such an argument was found not to be controlling and it was further emphasized that it was the duty of the regulatory agency to prevent potential injury by stopping unlawful practices in their incipency. Proof of a particular injury was not required (*see, Harry C. Daniels d/b/a Harry C. Daniels and Co. v. United States*, 242 F.2d 39 (7th Cir.) *cert. denied*, 354 U.S. 939 (1957)).

As set forth in the above cases, the custodial account is a trust account which is a conduit for funds received from the sale of consignors' livestock. When properly designated as required, such funds are protected from attachment by creditors and each consignor is further protected by the insurance coverage of the Federal Deposit Insurance Corporation. This was not done in this case.

The complainant's evidence has shown that respondent Crockett engaged in the business of a dealer without maintaining an adequate bond or its equivalent during the times alleged and pertinent hereto: October 10, 1984 [the complaint alleges January 10, 1985], to March 1985.

The respondent Cobb has been engaged in the sale of livestock for others since 1963, has operated his own sale at Crockett Livestock Sales since 1978, and conducts his sales in a small town of 400 people in a rural area of West Tennessee. The small volume sales were conducted in a simple and unsophisticated manner and, in the past, the respondent Cobb has been cooperative with the agency's officials with respect to compliance with the regulations.

It appears that the complaint relative to respondents' bond coverage, in this case, grew out of respondent Crockett's entry into a business at Scotts Hill, Tennessee, resulting in an increase in the size of respondent's operations without an increase in its bond coverage.

Respondents entered into a one-year lease of the Scotts Hill auction market facility and commenced operation under Crockett's name without amending its registration and increasing its bond coverage.

Respondent Cobb was orally advised, following review of the relevant business records of both facilities that the requirements of its Clause 2 bond was \$50,000.00, an unspecified amount of which was related to the volume of dealer business done at the Manry City location. A written notice to that effect was mailed to respondents under date of October 24, 1984, followed by a subsequent written notice dated January 10, 1985.

Notwithstanding such notices respondents failed to obtain and file the necessary \$50,000.00 dealer bond or approved bond equivalent.

Unable to comply with the directives of Packers and Stockyards persons relative to the increase in bond coverage, respondent Crockett terminated his business in March 1985. The complaint was filed August 23, 1985. The charge in the complaint relative to the Clause 2 bond had thus been resolved prior to the filing of the complaint inasmuch as the respondent Crockett had ceased to do business at Scotts Hill.

It was not controverted that respondents' Clause 1 and Clause 2 bonds were of the proper amount at the time of the hearing July 8, 1986.

The lease arrangement with Scotts Hill did not alleviate respondent responsibility. A bond issued to secure the dealer livestock purchase obligations of another registrant would not cover the respondents' obligation. Also, the discontinuance of the Scotts Hill operations does not obliterate the \$38,000.00 inadequacy in bond coverage which existed. Even disregarding the withdrawal of the \$12,000.00 certificate of deposit to the dealer trust fund agreement on file with the Secretary, which effectively eliminated all coverage then filed, dealer bond coverage remained inadequate for an approximate 6-month period.

The trust fund agreements of respondents were subject to the provisions of section 201.27(b) and (c) of the regulations, which provides:

(b) A bond equivalent may be filed in lieu of a bond. A bond equivalent shall be in the form of a trust fund agreement based on funds actually deposited and readily convertible to currency in the amount required by § 201.30. Such funds shall be invested or deposited, in the name of a trustee as set forth in § 201.32, in: (1) Fully negotiable obligations of the United States, or (2) deposits or accounts insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation. The provisions of §§ 201.27 through 201.34 shall be applicable to such trust agreements.

(c) Bonds and trust fund agreements shall be filed on forms approved by the Administrator. (9 C.F.R. section 201.27(b) and (c)). Prior to the release of pledged collateral, the trust fund agreement may be terminated as follows:

(c) Each trust fund agreement shall contain a provision requiring that, prior to terminating such trust fund agreement, at least 30 days notice in writing shall be given to the Administrator, Packers and Stockyards Administration, U.S. Department of Agriculture, Washington, D.C. 20250, by the party terminating the trust fund agreement. Such provision may state that in the event the principal named therein files an acceptable bond written by an approved surety to replace the trust fund agreement, the 30-day notice requirement may be waived and the trust fund agreement will be terminated as of the effective date of the replacement bond. (9 C.F.R. section 201.34(c)).



The Act and the regulations issued pursuant to it require market agencies, packers and dealers to maintain a reasonable bond to secure the performance of their livestock obligations. (7 U.S.C. section 204, 9 C.F.R. sections 201.19, 201.30). The bonding provisions were regarded as a special protection against future losses to the livestock producers. (H. Rep. No. 94-1043, 94th Cong., 2d Sess. p. 5; S. Rep. No. 94-932, 94th Cong., 2d Sess. pp. 5-6). The Department considers such bonding provisions vital to the effective enforcement of the Packers and Stockyards Act and for the protection of livestock producers, *In re: George County Stockyard, Inc.*, *supra*.

The respondents' continuance of operations after October 10, 1984 until March 1985, without maintaining adequate bond coverage is a willful violation of the Act (7 U.S.C. section 204) and the regulations (9 C.F.R. sections 201.19, 201.30) thereto. Circumstances portraying respondents' efforts to obtain adequate bonding do not mitigate from the violation. *In re: Donald Hafgjeman*, 4[2] Agric. Dec. 531 (1983); *In re: Mobnar Packing Company*, 41 Agric. Dec. 935 (1982).

There has been a persistency of purpose by complainant, with respect to its requests and motions to admit into evidence a post-hearing document, obtained from the bank where respondents had their trust agreements, relative to respondents' withdrawal of its certificates of deposit. Document marked Exhibit 12, *for identification*, is a letter received from the trustee on July 11, 1986, three days after the close of the hearing indicating the certificates of deposit were released on September 23, 1983.

An issue was raised at the oral hearing, as well as on brief, and in the pleadings, with respect to whether or not the complainant, after the close of the hearing, could obtain and adduce additional evidence (Exhibit 12 for identification) relative to the withdrawal of the certificates of deposit and make such a part of the record after the hearing had closed. The respondents objected thereto because they would be effectively denied the right of cross-examination and confrontation of witnesses against them. Also, complainant had not sought such information until the morning of the hearing. Respondents' objections were sustained at the oral hearing. Subsequently, the complainant, after the close of the hearing, and, the receipt of all evidence, moved into evidence a document *identified* as Exhibit 12, being the very document to which respondents' objections had been sustained. The Judge denied the admission into evidence of this document for the reasons that were set forth at the oral hearing. It deprived the respondents of the right of cross-examination and due process. I still maintain the correctness of that ruling. However, the determinations and conclusions reached herein are not influenced by whether or not the document marked *for identification* as Exhibit 12 was or was not admitted into evidence. An offer of proof was made and the proposed Exhibit may subsequently be received by the Judicial Officer if he does not agree with my ruling. Other evidence clearly establishes that, at times pertinent and material herein, the respondents were not in a position to obtain and did not comply with the bonding requirements after they had commenced business at the Scotts Hill facility during the period October 10, 1984 through March, 1985. As set forth more fully in the

Findings of Fact, the deficiency in the bonding coverage was not due solely to the increased volume generated by the Scotts Hill's sales.

A considerable amount of evidence, as well as arguments of the parties brief, have been devoted to applicable sanctions in this case. Initially, it must be recognized that the authority for the imposition of sanctions is reposed in the Secretary of Agriculture's Judicial Officer. This is clearly set forth in many cases.

Among the more recent ones is that of *In re: Richard N. Garver*, [Agric. Dec. 1090 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988)] wherein the Judicial Officer asserted his discretionary authority *ma sponte*, increase the agency's requested sanctions. He evaluated the sanctions ordered by the Administrative Law Judge and reiterated the Department's policy of imposing severe sanctions for serious and repeat violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to respondents, but also to other potential violators. It was further indicated in that decision that this policy had been followed in all of the Department's disciplinary proceedings since the early 1970's. Among other things set forth in that decision was the rationale by the Judicial Officer that he is not precluded from overruling the Department's sanction policy or from imposing a sanction greater than that recommended by the administrative officials. *Cf. In re: Rowland*, 40 Agric. Dec. 1934 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983).

Additionally, in the *Garver* case, *supra*, it was stated that:

" \* \* \* It has consistently been held that any hardship to the respondent's creditors, customers, community, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in livestock and meat industries prevails over the local interest that might be damaged as a result of a suspension order."  
[Footnote Omitted]

The authorities cited in the *Garver* case amply support the position taken by the Secretary's Judicial Officer and such cases will not be reiterated here.

The sanctions sought herein are a recordkeeping order, a cease and desist order, a six-week suspension, and a five thousand [dollar] (\$5,000.00) civil penalty.

The evidence does . . . ['] support the charges of the complainant that false and deceptive entries were made on accounts of sale and custodial account checks [but not] that respondents Cobb and Crockett violated the Act by permitting respondent Horner to purchase consigned livestock for speculative purposes. Significantly, the complainant's requested sanctions are premised upon the [other] contentions which it has proven, as set forth above.

The complainant introduced sanction testimony through the witness A. Jack Bellow, the Regional Supervisor for the Memphis Regional Office. A. Bellow testified as to the sanction policy of the agency and indicated among

[ The ALJ's word "not" is omitted.]

other things that four weeks had previously been considered the appropriate suspension period for custodial account shortages but that the sanctions in more recent years (three or four years) had reflected longer suspension periods. It will be noted that the violations in this case occurred in 1984. Furthermore, Mr. Bellow testified that no specific penalty was being sought as to the allegations relating to Mr. Horner, and that with respect to allegations of the keeping of inaccurate records, the complainant was seeking no specific sanctions but such allegations were considered in conjunction with others.

The Federal courts . . . [are generally supportive of] the sanction policies of the agencies and the Department of Agriculture's sanction policy has been set forth in great length by its Judicial Officer, as is set forth more fully herein.

It is noted by the complainant, suspensions may be ordered where, as here, it is established that the respondents have either violated the Act subsequent to having been placed on written notice with respect to similar violations, or, the record establishes that the violations which occurred were willful. Both alternative conditions, required by the Administrative Procedure Act, have been met with respect to the custodial account shortage and the failure to maintain a proper bond. (5 U.S.C. § 558(c)). The continued operation with impaired and inadequate bond coverage by respondents Cobb and Crockett was willful and intentional according to the decided cases.

In administrative disciplinary proceedings before the Secretary of Agriculture, it has been determined that a violation is willful if the respondent intentionally does an [a]ct which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts in careless disregard of the statutory requirements. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1982). The Department's Judicial Officer has adopted the Supreme Court's position in *Glover* and ruled that it is controlling in cases brought under the Packers and Stockyards Act. *In re: Shatkin*, 34 Agric. Dec. 296 (1975). Each of the practices engaged in by respondents Cobb and Crockett in violation of the Act and the regulations was willful under this standard.

The complainant, on brief, has set forth applicable precedent.

Suspensions, other than indefinite suspensions, imposed until a compliance with the financial condition, custodial account, and bonding requirements are achieved, are primarily imposed for deterrent purposes. The sanction policy of the Secretary has been implemented on a case by case basis with the sanction policy developing towards longer suspension periods in recent years. *In re: Mid-State's Livestock Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re: Rowland*, 40 Agric. Dec. 1934 (1981) [, *aff'd*, 713 F.2d 179 (6th Cir. 1983)]; *In re: Farmers Livestock Auction, Inc.*, [45 Agric. Dec. 691 (1986)]; *In re: Garver, supra*; *In re: Farmers and Ranchers Livestock Auction, Inc.*, [45 Agric. Dec. 234 (1986)] (Decision and Order as to Mr. Jerry Millsbaugh); *In re: Blackfoot Livestock Commission Co.*, [45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987)].

The respondents challenge the validity of such sanction policy and would show, according to the evidence of record:

(1) The complainant's witnesses testified that even if respondent Crockett had been in full compliance with the Act at the date of hearing, they still would seek a severe penalty for its deterrent effect. The evidence indicated that Mr. Horner no longer worked respondent Cobb and accordingly, the allegation of buying on consignment for speculative purposes was no longer an issue but if it was necessary to look at the deterrent effect of the civil penalty on the six-week period of suspension in that the respondents had previously been asked to correct these matters through letters on previous investigations and according to testimony did not do so.

(2) The evidence of record indicates that no study has ever been done nor is there any published material with respect to the deterrent effect of either greater suspension periods or greater amounts of civil penalties. The witness Mr. Jack Bellew indicated that he was aware of any "formal studies."

(3) The Packers and Stockyards has no written policy for sanctions.

(4) Agency policy is communicated to the regional supervisor by telephone and "on a case by case basis."

(5) The regional supervisor's recommendation as to the suspension period was not followed upon referral of the case to the Washington office. The suspension period was increased from thirty (30) days to six (6) weeks and the civil penalty recommendation of \$7,500.00 was decreased to \$5,000.00.

(6) The disparity between the regional supervisor's recommendation and that of "the agency" was justified by the witness as being for the purpose in making sanctions uniform nationwide. However, the [have] been no formal studies, known to complainant's witnesses relating to such sanctions.

The sanction testimony introduced through Mr. Bellew explained that suspension for custodial shortages was in the four-week range and that appropriate civil penalty for deterrent purposes in instances where operations are being conducted without the required bond coverage is generally 10 percent of the amount that should have been in effect. Also, the civil penalty sought in this proceeding is somewhat higher because the inadequacy is compounded by the impairment of the already inadequate bond covering the removal of the pledged certificates of deposit.

Thus, the complainant maintains that a convincing need has been shown for the imposition of a 6-week suspension and a \$5,000.00 civil penalty to encourage compliance with the Act and the bonding and custodial regulations by respondents Cobb and Crockett and by others operating in the industry. This requested sanction by the complainant is fully supported by the Judicial Officer's decisions, as set forth herein.

In the recent case of *In re: Blackfoot Livestock Commission Co.*, [45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987)] the Judicial Officer again set forth his authority with respect to the determination of sanction policy. Specifically considered in *Blackfoot* was the matter of shortages in the custodial account and it was reaffirmed therein that the Secretary has consistently held and the court's have sustained, that the failure of a market agency to maintain its custodial account in accordance with the requirements of § 201.42 of the regulations is a violation of §§ 301 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), as well as a violation of the regulations itself. (9 C.F.R. § 201.42). *In re: Arab Stock Yard, Inc.*, 37 Agric. Dec. 293 (1978) [*aff'd mem.*, 582 F.2d 39 (5th Cir. 1978)]; *In re: Breckenridge Auction and Sales Co.*, 36 Agric. Dec. 1522 (1977); *In re: Sechrist Sales Co.*, 36 Agric. Dec. 665 (1977); *In re: Hardy*, 33 Agric. Dec. 1383 (1974); *In re: Miller*, 33 Agric. Dec. 53 (1974), *aff'd sub nom. Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974). The important relevance of the *Blackfoot* case to this case is in its narration of the authority of the Judicial Officer, *sua sponte*, or, otherwise, to determine the sanctions to be imposed in these disciplinary cases. In the *Blackfoot* case the Judicial Officer exercised his discretionary authority to *increase* the sanction sought by the complainant. In doing so, he had occasion to state:

"First, complainant relies on the fact that complainant advised respondent of the sanction it would seek if a hearing were held, and this is a factor which respondents consider in deciding whether or not to settle a case. However, respondents should know (or guess) that the recommendation of complainant as to a sanction, although entitled to [great] weight, is not controlling. . . ." (Emphasis Added)

In addition, the *Blackfoot* case indicated among other things that:

"Furthermore, the Judicial Officer had long before announced the view that in any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction would be imposed in the pending case, rather than merely announce that in future cases the sanction would be increased. . . ."

Another recent case, although involving a substantial number of other violations, other than misuse of the custodial account, is that of *In re: Fanners and Ranchers Livestock Auction, Inc.*, [45 Agric. Dec. 234 (1986)].

As further authority to show the authority and discretion reposed in the Judicial Officer, with respect to sanctions, reference is made to the most recent case of the Department's Judicial Officer of *In re: Spencer Livestock Commission Co., and Mike Donaldson*, [46 Agric. Dec. 268 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)] wherein the Judicial Officer reviewed a prior decision of the Eighth Circuit in *Glover Livestock Commission Co. v. Hardin*, 454 F.2d 109 (8th Cir. 1972), *rev'd*, 411 U.S. 182 (1973). That decision reviews the Judicial Officer's reasoning as to why a reviewing Federal court should not

determine what is a reasonable suspension period. The position of the Judicial Officer is that:

If the congressional purpose of this remedial legislation is to be achieved, and if any degree of national uniformity in sanctions is to be achieved, reviewing courts must not determine whether an administratively imposed suspension period is "reasonable" based on what suspension period they would have imposed. Rather, they [the reviewing courts] should reverse only if the administrative sanction fails to meet the standards of the Administrative Procedure Act, i.e., if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (5 U.S.C. § 706(2)(A)). And it goes without saying that an administrative suspension period that greatly exceeds that which would have been imposed by the reviewing courts is not necessarily arbitrary, capricious, or an abuse of discretion.

Because of its relationship to the matter of sanctions in the present case the following quotations from the March, 1987, decision in the *Spence Livestock Commission Co.* case are appropriate:

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, e.g., *In re Welch*, 45 Agric. Dec. [1932 (1986)] (decision as to Benson) (\$10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act); *In re Garver*, 45 Agric. Dec. [1090 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988)] (2-year suspension); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. [1034 (1986)] (\$50,000 civil penalty), [remanded, 820 F.2d 1103 (9th Cir. 1987)]; *In re Corn State Meat Co.*, 45 Agric. Dec. [995 (1986)] (\$50,000 civil penalty); *In re Blackfoot Livestock Commission Co.* 45 Agric. Dec. [590 (1986)] (6-month suspension), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. [234 (1986)] (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. [2238 (1985)] (decision on remand) (8-month suspension and \$10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. [748 (1985)], *final consent decision*, 44 Agric. Dec. [1971 (1985)] (\$10,000 civil penalty); *In re Powell*, 44 Agric. Dec. [49 (1985)] (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. [1220 (1985)] (*appeal not timely filed*); *In re Mid-West Veal Distributors*, 43 Agric. Dec. [1124 (1984)] (\$77,000 civil penalty, with \$27,000 suspended); *In re Mayer*, 43 Agric. Dec. [439 (1984)] (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Poterman*, 42 Agric. Dec. [1843 (1983)], *aff'd*, 770 F.2d 888 (10th Cir. 1985) (\$20,000 civil penalty).

In addition, the Judicial Officer set forth in the *Spencer Livestock Commission Co.* case his explanation of sanctions as follows:

In determining sanctions to be imposed by the Department, great weight is given to the recommendation of the officials charged with the responsibility for administering the regulatory program. See *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 845-46 (1972) (ruling on reconsideration). Such administrative officials, during the day-to-day administration of a regulatory program, develop a "feel" for the severity of sanctions needed to serve as a deterrent to violations that cannot be developed by the Administrative Law Judges or the Judicial Officer, who come in contact with only a small part of the regulatory program.

*The recommendation of the administrative officials as to the sanction is not, of course, controlling.* For example, if some of the allegations are not proven or if there are mitigating circumstances not taken into consideration by the administrative officials, the sanction may be considerably less than that recommended by them. See, e.g., *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542 (1971). But if the alleged violations are proven, and it appears that the administrative officials have fully considered the respondent's contentions, the recommendation of the administrative officials as to the sanction needed to serve as an effective deterrent to the respondent and to other potential violators is given great weight. (Emphasis Added)

Thus the *rationale* of the above cited cases, as well as the authorities set forth therein, indicate the sanction policy of the Department of Agriculture which the Administrative Law Judge is required to follow.

The Administrative Law Judge is imposing [these] sanctions requested by the agency for the reasons set forth in the above cases. The respondents' arguments with respect to what should be a proper sanction have been considered carefully.

The respondents argue that the sanctions sought by the complainant should not be of such severe nature in view of what the respondents consider to be the only substantial charge i.e., the misuse of its custodial accounts. As noted above, it is found herein that the respondents also violated the bonding requirements of the Act.

However, the Department's recent cases disclose that the sanction imposed herein is in keeping with other cases and the Department's sanction policy. In addition to the *Spencer Livestock Commission Co.* case quoted above, the Judicial Officer has most recently stated, in the case of *In re: Rotches Pork Packers Inc., and David A Rotches*, [46 Agric. Dec. 573 (1987)] that:

"It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to

other potential violators. The basis for the Department's sanction policy is set forth at great length in numerous decisions,<sup>1</sup> *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. [268, 43] (1987)], which is set forth as an appendix to this decision.<sup>2</sup>

[Footnote to quoted decision]

<sup>1</sup>Severe sanctions issued pursuant to the Department's sanction policy were sustained, e.g., in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. [590 (1986)], *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-J&S Jers Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-31 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In Muehlenhauser*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 54 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-3 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Calanzano*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Main Potato Growers, Inc.*, 34 Agric. Dec. 713, 796, 801 (1975), *aff'd*, 541 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Trugash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

<sup>2</sup>In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, e.g., *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. [268 (1987)] (10-year suspension and \$30,000 civil penalty for increasing prices and weights in commission purchases) [ *aff'd*, 841 F.2d 1451 (9th Cir. 1988)]; *In re Welch*, 45 Agric. Dec. [1932 (1986)] (decision as to Benson) (\$10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act); *In re Garver*, 45 Agric. Dec. [1090 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988)] (2-year suspension); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. [1034 (1986)] (\$50,000 civil penalty, remanded, 820 F.2d 1103 (9th Cir. 1987)]; *In re Cam State Meat Co.*, 45 Agric. Dec. [995



(1986)] (\$50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. [590 (1986)] (6-month suspension), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. [234 (1986)] (decision as to Millsbaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. [2238 (1985)] (decision on remand) (8-month suspension and \$10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. [748 (1985)], *final consent decision*, 44 Agric. Dec. [1971 (1985)] (\$10,000 civil penalty); *In re Powell*, 4[6] Agric. Dec. [49 (1985)] (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. [1220 (1985)] (*appeal not timely filed*); *In re Mid-West Veal Distributors*, 43 Agric. Dec. [1124 (1984)] (\$77,000 civil penalty, with \$27,000 suspended); *In re Mayer*, 43 Agric. Dec. [439 (1984)] (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. [1848 (1983)], *aff'd*, 770 F.2d 888 (10th Cir. 1985) (\$20,000 civil penalty).

"In *In re Garver*, *supra*, 45 Agric. Dec. [at 1101-04], it is explained that 2-to-5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30-to-60-day suspension orders would have been issued in comparable cases a few years ago." Accordingly, the following Order is issued.

#### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend on appeal that the ALJ's findings are not adequately supported by the record, but the record abundantly supports the ALJ's findings. In fact, the proof here far surpasses the preponderance of the evidence, which is all that is required.<sup>12</sup> Respondents' arguments on appeal, in the main, merely reargue matters that were fully considered and correctly decided by the ALJ.

Complainant's Response to Respondents' Appeal and Cross-Appeal (Aug. 3, 1987) supports the ALJ's bond violation (Complaint, ¶ II) and custodial account violation (Complaint, ¶ III) decisions, but cross-appeals the ALJ's adverse decision on the alleged recordkeeping violation (Complaint, ¶ VI). Complainant elected (Complainant's Appeal, *supra*, at 1) not to pursue the allegation that respondents' employee speculated in consigned livestock (Complaint, ¶ IV).

Thus, there remain only the bond violation, the custodial account violation, and the recordkeeping violation for review. For the reasons below, the ALJ's decision on the bond and custodial account violations are affirmed, and a recordkeeping provision is included in the order. The appropriateness of the sanction is reviewed and affirmed below, as well. The ALJ's decision from the

<sup>12</sup>See *Herman & MacLean v. Buddleton*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (5th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

... 13, 1986) not to admit complainant's Exhibit are sustained, and complainant's request that the Judicial Officer now at Exhibit 12 (Complainant's Appeal, *supra*, at 4) is denied, for the reasons below (and, see footnote 3, *supra*).

Respondents' appeal to the Judicial Officer (June 29, 1987) alleges 1 discrete ALJ errors (which will be analyzed, *seriatim*), as follows (Respondents' Appeal at 4):

#### ISSUES ON APPEAL

Petitioner Cobb assigns the following issues as error committed by Administrative Law Judge.

1. The Administrative Law Judge erred in finding that the respondent had continued operations after October 10, 1984 until March, 1985 without maintaining adequate bond coverage, in willful violation of the Act (7 U.S.C. Section 204) and the Regulations (9 C.F.R. Section 201.19, 201.30).

2. The Administrative Law Judge erred in finding that the respondents failed to maintain and properly use their custodial accounts.

3. The Administrative Law Judge erred in imposing a six weeks suspension and assessing a civil penalty of Five Thousand Dollars (\$5,000.00) against Cobb.

4. The administrative proceeding, whereby the Secretary held an investigation; determined the penalty to be imposed; instituted enforcement proceedings; determined evidentiary rules and introduced its pre-determined demands at the ensuing hearing before the Administrative Law Judge; and, this appeal required by Administrative Regulation Section 1.145 from the Administrative Law Judge's ruling to the Secretary's Judicial Officer, all violate respondents' right to due process of law under the 5th Amendment to the Constitution of the United States.

#### Issue 1

Respondents' arguments in support of Issue 1 have already been thoroughly analyzed, and were correctly decided by the ALJ (Findings 5-27). While no good purpose would be served by rehashing these arguments, it should be noted that respondents' appeal provides nondispositive details from the time period in question which draw fine distinctions, and question the performance of P&S employees in 1984. However, as the ALJ meticulously points out, the P&S personnel orally (Oct. 8, 1984 (Finding 8)) and in writing (Oct. 24, 1984 (Finding 11), and January 10, 1985 (CX 4B)) notified respondents of the discrepancy. Respondents did not correct the deficiency,

yet continued to operate. This constitutes the violation, and the facts amassed by respondents do not exculpate them.

Moreover, the arguments that respondents were "seeking" a bond during the period of violation and that no one was hurt financially are not mitigating. It is well-settled that operating without a bond is a serious violation, and efforts to secure a bond do not mitigate from the violation. Also, whether anyone was shown to have been financially hurt is immaterial, since the Department's duty is to stop unlawful practices in their incipency. These principles were recently restated in *In re Tiemann*, 47 Agric. Dec. \_\_\_, slip op. at 30-31 (Oct. 20, 1988), as follows:

Respondent claims that its search for a bond *pendente lite* is mitigating. It is not, for the reasons, immediately above. Moreover, it is well-settled that operating without a bond is a serious violation, and efforts to secure a bond do not mitigate from the violation. This was recently restated in *In re Porter*, 47 Agric. Dec. \_\_\_, slip op. at 26 (Apr. 28, 1988), as follows (emphasis added):

Respondent did not acquire the required bond coverage and continued operations without maintaining adequate bond coverage. This is a willful violation of the Act (7 U.S.C. § 204) and the regulations (9 C.F.R. §§ 201.29, 201.30) thereto. *Circumstances portraying respondent's efforts to obtain adequate bonding do not mitigate from the violation. In re: Donald Hageman*, 4[2] Agric. Dec. 531 (1983); *In re: Molnar Packing Company*, 41 Agric. Dec. 935 (1982); *In re: E. Gursky*, 38 Agric. Dec. 1178 (1979).

Respondent argues that the record shows that no one was financially damaged by respondent's conduct. First of all, this is not true. . . .

But, even if it were true that the sellers of livestock were somehow not shown to be hurt financially by respondent's failure to pay, this would not sufficiently mitigate matters for respondent. This follows because "it has been consistently Departmental policy under section 312(a) of the Act (7 U.S.C. § 213(a)) that it is not necessary to prove particular injury, because it is the Department's duty to stop unlawful practices in their incipency, prior to actual injury" (*In re White*, 47 Agric. Dec. \_\_\_, slip op. at 73 (Jan. 11, 1988), [*aff'd per curiam*, No. 88-3144 (6th Cir. Dec. 15, 1988)]).

Respondents argue that its violation was not willful, but, as correctly pointed out in the ALJ's Initial Decision (Finding 19), the violation was willful, as follows:

19. The continued operation with impaired and inadequate bond coverage by respondents Cobb and Crockett was an unfair practice and was willful and intentional. The position of the

Department is that a violation is willful if the respondent intentionally does an act which is prohibited, irrespective of motive or reliance on erroneous advice, or acts in disregard of the statutory requirements. *Butz v. Livestock Commission Co.*, 411 U.S. 182 (1982).

Complainant's Response to Respondents' Appeal and (Aug. 3, 1987, pp. 2-3) quite accurately responds to, and refutes Issue 1 arguments. However, complainant's earnestly-argued admission of complainant's Exhibit 12 (Complainant's Response concerning the premature release of pledged collateral from the respondents' original bank, is not granted. As I understand it, their evidence would show a longer period of time, at a 10 percent discrepancy in respondents' bond coverage, than the ALJ found.

This is the sort of evidence which would have been admissible at the hearing. But, the evidence was not made available by even the hearing date, and respondents' counsel advances an arguable claim that it would be prejudicial and unfair to respondents to have admitted it at a late date.

Complainant, however, is aware that the Department's rules give the Judicial Officer much leeway in this area. Complainant (Complainant's Response, *supra*, at 4) that respondents' ordinary records would contain evidence of the receipt of the pertinent deposit proceeds. Thus, complainant argues that the Judicial Officer reopen the record for Exhibit 12, and remand for further procedure to receive respondents' information to rebut any inaccurate statement complainant.

In fact, the Judicial Officer does have the authority to consider a party's proof as evidence, without a remand for further proceedings, in appropriate circumstances. As stated in *In re Carpenito Bros., Inc.*, 46 Agric. 502-03 (1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished WESTLAW):

Accordingly, the ALJ erroneously excluded complainant's evidence as to respondent's noncompliance with the payment provisions of the months immediately prior to the hearing. Complainant made an appropriate offer of proof (Tr. 51-54) in accordance with the Department's rules of practice, which provide (7 C.F.R. § 1.141(g).

(7) *Offer of Proof.* Whenever evidence is excluded by the Judge, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in the transcript in toto. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the hearing record. In either event, the evidence shall be considered a part of the transcript and hearing record.

if the Judicial Officer, upon appeal, decides the Judge's ruling excluding the evidence was erroneous and prejudicial. If the Judicial Officer decides the Judge's ruling excluding the evidence was erroneous and prejudicial and that it would be inappropriate to have such evidence considered a part of the hearing record, the Judicial Officer may direct that the hearing be re-opened to permit the taking of such evidence or for any other purpose in connection with the excluded evidence.

Under the Department's rules of practice, I am considering complainant's offer of proof as to respondent's noncompliance during the months immediately prior to the hearing as evidence in this proceeding.<sup>8</sup> As stated in *Southern Nat. Mfg. Co., Inc. v. EPA*, 470 F.2d 194, 200 (8th Cir. 1972), "[t]hese provisions for agency review gave

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<sup>8</sup>In *re Thornton*, 38 Agric. Dec. 1425, 1433 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Corona Livestock Auction, Inc.*, 36 Agric. Dec. 1169, 1171 n.2 (1976) (remand order), *final decision*, 36 Agric. Dec. 1285 (1977), *rev'd on other grounds*, 607 F.2d 811 (9th Cir. 1979); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 & n.5 (1976) (fairness to respondents did not require a remand since "respondents' unwarranted objections resulted in the erroneous exclusion of the evidence," and the regulations and complainant's attorney informed respondents that the excluded evidence might later be admitted to their detriment, *id.* n.5), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

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adequate advance warning to petitioners that excluded unfavorable evidence might later be admitted to their detriment." Moreover, respondent's attorney was expressly advised that if the Judicial Officer should reverse the ALJ's evidentiary ruling excluding complainant's evidence, he might receive it as evidence without a remand for further proceedings (Tr. 56).

However, here complainant's proffered exhibit 12 would add nothing to the complainant's case (or to support the sanction), and complainant offers no good reason for its delay in procuring the exhibit. Thus, I will not disturb the ALJ's rulings on the inadmissibility of complainant's Exhibit 12.

All of respondents' other arguments concerning Issue 1 have been thoroughly considered, and even if not specifically mentioned, are hereby rejected.

## Issue 2

Respondents' Issue 2 avers error in the ALJ's finding of a custodial account violation; but, no points are raised which were not thoroughly analyzed and correctly decided by the ALJ (Findings 28-39). No good

purpose would be served by rehashing respondents' Issue 2 argument if I did, my analysis would track almost exactly complainant's Complainant's Response to Respondents' Appeal and Complainant's Appeal (Aug. 3, 1987, pp. 5-7).

I observe that respondents earnestly (albeit mistakenly) believe have committed no custodial account violation. This is apparently so vigorously argue that their irrevocable line of credit has worked. That is, respondents insist that no consignor has ever been hurt money, or has ever had a check returned, etc. However, the ALJ pointed out that this is a regulated industry, and participants there allowed to use their "subjective judgment" to determine whether an account is in proper balance, in derogation of the specific requirements devised by the Secretary uniformly to protect res customers--and, by extension, the industry itself (Finding 34 n.6). pointed out, *supra*, it is the Department's duty to stop unlawful practices by their incipency, prior to actual injury.

Moreover, I find the ALJ's detailed analysis and cited cases concerning custodial account violation to be dispositive of the relevant issues on raised by respondents (Initial Decision at 34-43). I would only add to the ALJ's discussion of respondents' "continuing course of conduct" (Initial Decision at 38). The Department has routinely and for a long interpreted the word "practice" (and by extension the phrase "course of conduct") to be fulfilled by a single act in section 312(a) cases. That is, the term of art, used in a general sense, when applied to a regulated industry was set forth recently in the *White* decision (*In re White*, 47 Agric. 100, slip op. at 89 n.10 (Jan. 11, 1988), *aff'd per curiam*, No. 88-3144 D.C. 15, 1988), as follows:

Respondent's false weighing involved in paragraph II involves two separate instances of false weighing. But even if they were regarded as one violation, a single violation may be an unfair and deceptive "practice," in violation of section 312(a) of the Act, because the word "practice" is used in a general sense, that is, as applied to the regulated industry and does not require that the respondent in an individual instance indulge in the activity long enough and often enough to amount to a course of conduct on his part." *Rielly v. Steele-Siman & Co.*, 11 Agric. Dec. 584, 589 (1952). *Accord Swift & Co. v. United States*, 317 F.2d 55-56 (7th Cir. 1963); *Rouse v. Platte Valley Livestock, Inc.*, 597 Supp. 1055, 1056-61 (D. Neb. 1984); *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Neb. 382, 315 N.W.2d 229, 230 (1982); *Neugebauer v. Ryken, Cir.* 74-4018 (S.D.S.D. Sept. 30, 1974), printed in 34 Agric. Dec. 1712, 1715-18 (1975); *In re Mid-South Livestock, Inc.*, 37 Agric. Dec. 547, 563-64 (1977), *aff'd sub nom. In re Ryk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *Northwest Cattle Co. v. Iowa City Sales Co.*, 14 Agric. Dec. 276, 279-80 (1955); *Hughes v. Pease*, 1 Agric. Dec. 235, 236-40 (1942). *Cf. Ex parte Delaney*, 43 Cal. 4 479-80 (1872); *State v. Randall*, 248 S.W.2d 860, 863 (Mo. 1952); *St. v. Keet*, 269 Mo. 206, 190 S.W. 573, 574-76 (1916); and *Annot., Licens*

*Single Transaction*, 93 A.L.R.2d 90, 99-100 (1964) (all involving other statutory and constitutional language in which a single act was held to constitute a practice).

### Issue 3

Respondents' Issue 3 is that the ALJ erred in imposing the sanction of a \$5,000 civil penalty and a 6-week suspension against Cobb (respondents' appeal seems to use "Cobb" to mean both respondents Cobb and Crockett Livestock Sales Company, Inc.). To the extent that respondents here reargue that no willful violations of the bonding and custodial account regulations occurred, these issues already were found to have been decided correctly by the ALJ, *supra*. Thus, we are now only concerned with the sanctions imposed therefor.

Respondents argue that the ALJ (erroneously) failed to consider the effect of a suspension order on respondents' ability to continue in business (Respondents' Appeal at 22). While true, this is not error. In fact, the ALJ's quotation from the *Garver* case in the Initial Decision (p. 49) is correct (and is correctly characterized by respondents), in that hardship to creditors, customers, community, or employees resulting from a suspension order is given *no weight* in determining the sanction. This is because a suspension order is based upon a different statute (7 U.S.C. § 204) than is a civil penalty (money fine) (7 U.S.C. § 213(b)); and, while 7 U.S.C. § 213(b) requires consideration of specified factors, 7 U.S.C. § 204 does not. This was explained in the recent case of *In re Rodman*, 47 Agric. Dec. \_\_\_, slip op. at 65-66 (May 27, 1988),<sup>14</sup> as follows:

Finally, respondents contend that the criteria in § 312(b) of the Act (7 U.S.C. § 213(b)) must be considered in determining the length of the suspension order. If I were to consider the criteria in 7 U.S.C. § 213(b), I would still suspend respondents for 35 days. But the criteria in 7 U.S.C. § 213(b) are irrelevant to a suspension order. As stated in *Spencer Livestock Commission Co. v. Department of Agriculture*, 841 F.2d 1451, 1457 (9th Cir. 1988), in affirming a 10-year suspension order under the Packers and Stockyards Act:

#### 2. Factors Considered Under § 213(b)

Petitioners contend that factors the statute mandates the ALJ and JO to consider preclude the imposition of a 10-year suspension. Section 213(b) requires the Secretary, before assessing *monetary* penalties, to consider "the gravity of the

<sup>14</sup>The *Rodman* decision summarizes the Department's custodial account regulations from 1921-1982, including administrative interpretations. Judicial decisions affirming the Department's custodial account enforcement proceedings from 1932 to 1987 are also analyzed in great detail. Willfulness, in this context, is also examined in great detail. On all of those issues, the ALJ's decision in the case herein is completely consonant with *Rodman*.

offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business." 7 U.S.C. § 213(b). Section 204, which permits the Secretary to suspend a registrant "for a reasonable specified period," contains no parallel provision. 7 U.S.C. § 204.

Nonetheless, petitioners argue that it is reasonable to read the § 213(b) factors into § 204, since "it does not appear to be the congressional intent to permit a sanction which has the effect of completely and permanently excluding a person from the livestock marketing industry." Brief of Petitioner at 29.

Petitioners cite no authority for this contention, nor is there any. A more reasonable reading than that advanced by petitioner is that since Congress chose to include the language in one provision and omit it from the other, it did not require the factors to be considered as to the latter. [Footnote omitted.]

Moreover, respondents' reliance on the *Bosma* decision to support their point (Respondents' Appeal, *supra*, at 22) is also misplaced, because the no suspension sanction in the *Bosma* decision, rather, a civil penalty ordered under 7 U.S.C. § 213(b). (See *Bosma v. USDA*, 754 F.2d 81 (9th Cir. 1984)).

It is noteworthy that respondents do not raise this argument (the 7 U.S.C. § 213(b) criteria) concerning the \$5,000 civil penalty, where such an argument would be appropriate. Complainant's Appeal (p. 8) points out the discrepancy and argues that it is because respondent apparently recognized that a civil penalty of this size could have little effect on respondents' ability to remain in business. For whatever reason, respondents have not come forward about the ALJ's failure to consider criteria required in 7 U.S.C. § 213(b) proceedings, with respect to the \$5,000 civil penalty.

However, this failure by the ALJ to consider directly these criteria is a reversible error, where the preponderance of the evidence on the record as a whole allows the Judicial Officer to consider the gravity of the offense, the size of the business involved, and the effect of the ALJ's recommended penalty on the ability of respondents to continue in business (7 U.S.C. § 213(b)). This follows because the Judicial Officer is entirely free to substitute his judgment for that of the ALJ on all questions. As this is an important point, it would be appropriate here to digress for a statement of support for this position, which was recently set forth in *In re Western Cattle Co.*, 47 Agric. Dec. \_\_\_, slip op. at 47-51 (June 23, 1988), docketed, No. 88-2179 (8th Cir. Aug. 10, 1988), as follows:

Findings of fact by ALJ's are consistently given great weight by the Judicial Officer. As stated in *In re Spencer Livestock Commission*, 46 Agric. Dec. [268, 407-09 (1987)], *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

The superior advantages of the ALJ, who saw and heard the witnesses testify, for determining their credibility, including



determining the expertise and credibility of expert witnesses, is well recognized. As stated in *Great Western Food Distributors v. Brannan*, 201 F.2d 476, 479-80 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953), on appeal from a decision by USDA's Judicial Officer:

Often the "most telling part" of the evidence is not apparent from the printed page, "for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors". *N.L.R.B. v. Universal Camera Corp.*, 2 Cir., 190 F.2d 429, 430. Thus, "we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth." *Ohio Associated Tel. Co. v. N.L.R.B.*, 6 Cir., 192 F.2d 664, 668.

... In addition, the technical and complex nature of the charges made necessitated recourse to extensive use of expert testimony, for here, as is often the case in proceedings under regulatory statutes, the evidence is largely of a dual nature: statistical and parol interpretation of the statistics. In the latter aspect the referee [ALJ] again possesses a greatly advantageous position, for, as the several experts testify, he is able to ascertain their grasp and knowledge, their perspective and understanding of the materials presented to them for interpretation. Their conduct on the stand may enhance or belie their status as experts. In short, anyone who has observed witnesses on the stand will know that those "who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of courts of review who do not enjoy the same advantages." *Jennings v. Murphy*, 7 Cir., 194 F.2d 35, 36.

It would seem, then, that the function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining whether the finder of the fact was justified, i.e. acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings. To go further is to disregard the "most telling part" of the evidence. *N.L.R.B. v. Universal Camera Corp.*, *supra*. With this in mind we approach the proof offered in this proceeding.

Similarly, in *Cella v. United States*, 208 F.2d 783, 788 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), a case involving false weights under the Packers and Stockyards Act, the court stated:

The hearing officer observed these witnesses upon the stand. He was the trier of the facts. The matter of their credibility was for him to decide. *Great Western Food Distributors v. Brannan*, 7 Cir., 201 F.2d 476, 479.

Finally, in *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970), also involving false weights under the Packers and Stockyards Act, the court stated:

When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. *National Labor Relations Board v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952); see also *United States v. Oregon Medical Society*, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

*Accord Blackfoot Livestock Comm'n Co. v. USDA*, 810 F.2d 916 (9th Cir. 1987).

Notwithstanding the weight that is properly given to an ALJ's finding of fact, such findings of fact are not binding on the Judicial Officer, and judgment may be substituted for that of the ALJ on all questions. Now I agree here with all of the ALJ's findings, and where the ALJ's fact adopted, they become almost unassailable. Points and authorities under these principles were recently restated in *In re Victor L. Kent & Sons, Inc. Agric. Dec.* \_\_\_, slip op. at 17-20 (Apr. 29, 1988), as follows:

[I]t is the consistent practice of the Judicial Officer to give great weight to the findings of fact by ALJ's, since they have the opportunity to see and hear the witnesses. However, the ALJ's findings are not sacrosanct, and I am entirely free to substitute my judgment for that of the hearing officer on all questions. It is important to note here that where there is the possibility of drawing two inconsistent inferences from the evidence, I am not prevented from drawing one. Also, the overruling of an ALJ's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. If my inferences are supported by substantial evidence, they cannot be set aside even though the reviewing court could draw a different inference. When I reach different or opposite results from the ALJ, the ALJ's findings should be considered on review and given

such weight as they merit within reason and the light of judicial experience. Where I have overruled an ALJ's findings, in many cases, based upon credibility determinations, I have relied on documentary evidence or inferences from the facts. The points and authorities for this statement of law and practice on the reversal of an ALJ's findings were recently restated in *In re Collins*, 46 Agric. Dec. [217, 227-29 (1987)], as follows:

It is the consistent practice of the Judicial Officer to give great weight to the findings of fact by ALJ's since they have the opportunity to see and hear the witnesses testify (footnote omitted). When an agency adopts findings of fact by an ALJ based on credibility determinations, the task of the reviewing court is easier than when the agency overrules such findings, i.e., an ALJ's findings of fact based on credibility determinations, adopted by the agency, are almost unassailable. *Blackfoot Livestock Comm'n Co. v. USDA*, [810 F.2d 916, 920-21 (9th Cir. 1987)]. As stated in Davis, 3 *Administrative Law Treatise* § 17.16, at 336 (2d ed. 1980):

When the agency adopts the ALJ's findings, the task of the reviewing court is normally easier; a common note that is struck is that an ALJ's findings adopted by the agency may not be upset unless it is "hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952); *International Union v. NLRB*, 459 F.2d 1329, 1351 (D.C. Cir. 1972) (Tamm, Jr., concurring and dissenting); *NLRB v. Stark*, 525 F.2d 422, 425-26 (2d Cir. 1975), cert. denied 424 U.S. 967 (1976); *NLRB v. Columbia University*, 541 F.2d 922, 928 (2d Cir. 1976).

However, Professor Davis makes it clear that an agency is in a different position vis-a-vis an ALJ's findings of fact based on credibility determinations than a reviewing court. He states (*id.* at 327):

Because of the provision of § 557(b) that "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision," the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses, and even despite the hearing officer's observation of the witnesses. The law that had been established before the APA continues: "Even on a question of the credibility of contradictory witnesses,

notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner." *NLRB v. Tex-O-Kan Flour Mills*, 122 F.2d 433, 437 (5th Cir. 1941).

Moreover, Professor Davis explains that an agency can overrule an ALJ's findings based on credibility determinations irrespective of whether a very substantial preponderance of the evidence supports the agency's decision. He states (*id.* at 332) that the "orthodox doctrine" consistent with Supreme Court decisions is set forth in *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Quoting from the court's decision rather than the abbreviated version in Professor Davis' treatise (*ibid.*):

The findings of the Commission must be accepted by this court if there is substantial evidence on the record considered as a whole to support them. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The Commission's overruling of the Law Judge's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955). And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); *National Macaroni*, *supra*. If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference. *National Macaroni*, *supra*.

The Commission must consider the initial decision of the Law Judge and the evidence in the record on which it was based. *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 138 U.S.App.D.C. 152, 425 F.2d 583 (1970). But the findings and conclusions of the Law Judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal. *OKC Corp. v. Federal Trade Commission*, 455 F.2d 1159 (10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's findings should be considered on review and given such weight as they merit within reason and the light of

judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra*.

*Accord Blackfoot Livestock Comm'n Co. v. USDA*, [810 F.2d 916, 920-21 (9th Cir. 1987)].

Here, the ALJ neglected to set forth the evidence supporting the \$5,000 civil penalty against the criteria of 7 U.S.C. § 213(b). The Judicial Officer has the authority to remedy this oversight, which is done immediately below.

My examination of the record reveals much evidence that the criteria of 7 U.S.C. § 213(b) can be considered and found to support the \$5,000 civil penalty. Testimony by the complainant's sanction witness, Mr. Jack D. Bellevue specifically details the consideration of these three criteria in fashioning the civil penalty, as follows (Tr. 147-48) (emphasis added):

BY MR. PAUL

Q. And by reason of all of the violations alleged and testimony presented here with respect to such violations, the total sanction that you have indicated is six weeks and *five thousand dollars* and an indefinite suspension until compliance with custodial cease and desist, that is your recommendation based on all of these violations?

A. Yes. This is the agency's recommendation based on *the seriousness of the violations*.

Q. In reaching this recommendation, what consideration is given to the prior compliance history of the respondents?

A. The prior compliance history is given consideration as to, I guess, *to the seriousness of the violations*, whether or not how much of a deterrent factor the order must play on the registrant and other registrants in the business. Also, in arriving at the civil penalty we have to look at *what effect the civil penalty will have on the registrant's ability to continue in business*.

Q. And have you reviewed the annual report submitted by the respondent as to the volume of business and the bond requirement and ---

A. Yes, it has been reviewed.

Q. And what effect would the imposition of a five thousand dollar civil penalty on the respondents have, in your opinion?

A. The *five thousand dollar civil penalty would be somewhat equivalent to approximately one week's commissions, slightly less than one week's commissions*.

Thus, I find that a consideration of the criteria under 7 U.S.C. § supports the \$5,000 civil penalty.

Respondents argue (Respondents' Appeal, *supra*, at 23) that the sa herein are not sustainable, both because the actions of respondents w willful, and, because the respondents were not allowed an opportu achieve compliance consonant with the provisions of 5 U.S.C. § 558(c ALJ correctly concluded that respondents were wrong on both these (Initial Decision at 51-52). While the ALJ's analysis and cases in sup this conclusion are adequate, further discussion of the willfulness issa forth in the *Rodman* decision (*Rodman*, *supra*, at 51-53), as follows:

#### V. Respondents' Violations Were Willful.

Under the Administrative Procedure Act, a suspension order can be issued unless the violations were willful or a prior warning letter sent. Specifically, the Act provides (5 U.S.C. § 558(e)):

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

Respondents' violations were willful, within the meaning of t term in the Administrative Procedure Act. As stated in *Geo Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974):

Moreover, the "second chance" doctrine would apply only if the violations had not been willful. It is clear enough that under § 9(b), doing an act which is prohibited and doing it intentionally "irrespective of evil motive or reliance on erroneous advice" or "acts with careless disregard of statutory requirements" are willful. See *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); see also *United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 243, 58 S.Ct. 49, 82 L.Ed. 518 (1938).

Similarly, in *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 196 the court held:

Petitioner urges his denial of trading privileges amounted to a suspension of a license, and that section 9(b) of the Administrative Procedure Act, 5 U.S.C.A. § 1008(b), was

violated. We do not reach that question for the same section excludes cases of wilfulness. We hold the petitioner's conduct was wilful within the meaning of section 9(b) of the Administrative Procedure Act. We think it clear that if a person 1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is wilful. *Eastern Produce Co. v. Benson*, 3 Cir., 278 F.2d 606, 609.

See also, *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981). The definition of wilful under the Administrative Procedure Act is discussed at length in *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975). . . .<sup>17</sup>

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<sup>17</sup>*Shatkin* explains (34 Agric. Dec. at 306-14) that the decision in *Economou v. USDA*, 494 F.2d 519 (2d Cir. 1974), which held that the violations under the Commodity Exchange Act were not willful because the "customary warning letter" was not sent, is erroneous because it nullifies the willfulness exception in the Administrative Procedure Act. Furthermore, it is not the practice (or custom) under the Packers and Stockyards Act to send a warning letter, in the case of serious violations. See, e.g., Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law* 271 (1981 and 1987 Cum. Supp.); *In re White*, 47 Agric. Dec. \_\_\_, slip op. at 118 (Jan. 11, 1988), [*aff'd per curiam*, No. 88-3144 (6th Cir. Dec. 15, 1988)]; *In re DuQuoin Packing Co.*, 41 Agric. Dec. 1367, 1381 n.2 (1982); and *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1135 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978). My decision in *In re Economou*, 32 Agric. Dec. 14 (1973), *rev'd*, 494 F.2d 519 (2d Cir. 1974), explaining that Arthur N. Economou willfully failed to meet the minimum financial requirements of the Commodity Exchange Act by puffing up assets and underreporting liabilities in transactions with commonly controlled companies, including the American Board of Trade, had it not been reversed by the court, would have sounded the death knell of the American Board of Trade (according to Mr. Economou (32 Agric. Dec. at 125)), before investors put in about \$79 million. The American Board of Trade recently went broke costing investors about \$49 million. See *The Wall Street Journal*, Feb. 3, 1987, at 50, col. 3.

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Finally, in *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 186-88 (1973), the Court expressly held that registrants may be suspended under the Packers and Stock ^CW.C. § 204) for negligent or careless violations that are not intentional or flagrant, stating:

The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent. *Hyatt v. United States*, 276 F.2d 308, 313 (CA 10 1960); *G.H. Miller & Co. v. United States*, 260 F.2d 286 (CA 7 1958); *In re Silver*, 21 Agric. Dec. 1438, 1452 (1962).<sup>5</sup>

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<sup>5</sup>It is by no means clear that respondent's violations were merely negligent. The hearing examiner found that respondent had "intentionally" underweighed livestock, and the Judicial Officer stated: "We conclude then, as did the hearing examiner, that respondent willfully violated . . . the act." (Emphasis added.) "Willfully" could refer to either intentional conduct or conduct that was merely careless or negligent. It seems clear, however, that the Judicial Officer sustained the hearing examiner's finding that the violations were "intentional."

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The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. *FCC v. WOKO*, 329 U.S. 223, 227-228 (1946); *FTC v. Universal-Rundle Corp.*, 387 U.S., at 250, 251; *G.H. Miller & Co. v. United States*, *supra*, at 296; *Hiller v. SEC*, 373 F.2d 107, 110 (CA 2 1967); *Kent v. Hardin*, 425 F.2d 1346, 1349 (CA 5 1970).

Moreover, the Court of Appeals may have been in error in acting on the premise that the Secretary's practice was to impose suspensions only in cases of "intentional and flagrant conduct." [Footnote omitted.] The Secretary's practice, rather, apparently is to employ that sanction as in his judgment best serves to deter violations and achieve the objectives of that statute. Congress plainly intended in its broad grant to give the Secretary that breadth of discretion. Therefore, mere unevenness in the application of the sanction does not render its application in a particular case "unwarranted in law."

Finally, under Issue 3, respondents argue that the Secretary has no sanction policy. Again, the ALJ does an adequate job in refuting argument (Initial Decision at 52-62). However, since the Departm



sanction policy is so vital to effective enforcement of this regulatory statute, a further brief statement may be appropriate.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, e.g., *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), which is set forth in the Appendix to this decision.

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years. In addition to the cases cited near the end of the ALJ's conclusions, see *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. \_\_\_\_ (Aug. 13, 1987) (1-year suspension for custodial account violations and various fraudulent activities); *In re Parchman*, 46 Agric. Dec. \_\_\_\_ (May 28, 1987) (90-day suspension and \$10,000 civil penalty for weighing violations), *aff'd*, 852 F.2d 858 (6th Cir. 1988); and *In re Roches Pork Packers, Inc.*, 46 Agric. Dec. 573 (1987) (\$50,000 civil penalty for failing to pay for meat products).

#### Issue 4

Respondents restate Issue 4 (Respondents' Appeal, *supra*, at 27), which argues that respondents were denied due process, as follows:

#### ISSUE ON APPEAL-NO. 4

This administrative proceeding, whereby the Secretary held an investigation; determined the penalty to be imposed; instituted enforcement proceedings; determined evidentiary rules and introduced its pre-determined demands at the ensuing hearing before the Administrative Law Judge; and, this appeal required by Administrative Regulation Section 1.145 from the Administrative Law Judge's ruling to the Secretary's Judicial Officer, all violate respondents' right to due process of law under the 5th Amendment to the Constitution of the United States.

The Department's adjudicatory procedure under the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) has been routinely reviewed and repeatedly sustained. The Department's fundamental administrative enforcement structure, as described by respondents immediately above, is sound, follows the congressional mandates contained in the Administrative Procedure Act, and does not violate due process. On the contrary, it assures due process.

To the extent that respondents perhaps may have a serious issue implicit in this general approach, I suspect that it is that the Judicial Officer is perceived (erroneously) as possessing both investigative and adjudicatory powers, which respondents allege are unfairly used to deny respondents their Fifth Amendment protections under the Constitution of the United States.

(At least, this appears to be the basis for the cited cases in this part respondents' appeal.) I conclude that this misperception is the root (and, indeed, the failure) of Issue 4.

Unfortunately, respondents really have not completely formed their argument, because of respondents' mistaken belief that the Judicial Officer involved *ab initio* in fashioning the sanction in a particular proceeding. It is, the respondents argue that the Judicial Officer dictates a proper sanction in a particular proceeding. That is, the respondents argue that the Judicial Officer dictates a proper sanction in a specific case to regulatory officials the time of the hearing, presents his demands for penalty at the hearing, and may later impose on the ALJ's decision his original sanction, as follows (Respondents' Appeal, *supra*, at 31):

The record reflects that the Judicial Officer decides what evidence is admissible in the case; has the right to present his demands for penalty at the hearing; and in the event the Administrative Law Judge's decision is not acceptable to the judicial officer, he may nonetheless impose his original demands. [Footnote omitted.]

This is really off the mark. The Judicial Officer *by prior decisions* (and, to a very limited extent in Rulings Upon Certified Questions, see, 7 C.F.R. 1.143(c)), does indicate, *generally*, appropriate and acceptable sanctions depending upon the facts of a given prior proceeding. These decided cases many of which contain the Department's sanction policy, stand to guide administrative officials and ALJs, before and during enforcement proceedings in fashioning a proper sanction.

However, the Judicial Officer does not get involved personally in the trial level hearings (beyond a few-and-far-between certified questions), and certainly does not impose his "original demands" on respondents--he has no such "original demands." Since this argument is not really developed properly based as it is upon an incomplete understanding of the Department's administrative procedure, there is no need to belabor this point. However, if I were to analyze it further, I would track almost exactly complainant's response to this argument (Complainant's Response, *supra*, at 9101).

The actual relationship is that the Judicial Officer assigns great weight to the sanction recommendations of agency officials, and this was stated in the recent case of *In re Tiemann*, 47 Agric. Dec. \_\_\_, slip op. at 39 (Oct. 20 1988), as follows:

In closing, I note that it is axiomatic that the Judicial Officer assigns great weight to the sanction recommendations of the agency officials of the Department. In the absence of the agency recommendation, a more severe sanction might have been imposed for this three-time violator. See *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. [268, 415 (1987)] (10-year suspension and \$30,000 civil penalty), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

However, recommendations by agency officials are not controlling, and may be increased or decreased by the Judicial Officer, (e.g. to achieve *re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590, 634 (1986), *aff'd*, 801 F.2d 916 (9th Cir. 1987), as follows (emphasis added):

First, complainant relies on the fact that complainant advised respondent of the sanction it would seek if a hearing were held, and this is a factor which respondents consider in deciding whether or not to settle a case. However, respondents should know (or guess) that the recommendation of complainant as to a sanction, although entitled to great weight, is not controlling. Although the Judicial Officer for many years adhered to the self-imposed limitation that he would never increase the sanction requested by administrative officials, in 1981 he overruled that portion of the Department's sanction policy which provided that the Judicial Officer would never increase the sanction recommended by administrative officials (in order to achieve uniformity in sanctions for comparable violations). In *re Rowland*, 40 Agric. Dec. 1934, 1952 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983). Accordingly, at the time the complaint was issued in this case in 1983, a respondent had no guarantee that the Judicial Officer would not increase a sanction recommended by complainant.

It has become fairly routine in these types of cases for those respondent lacking a meritorious defense to assail the administrative process, to claim denial of due process, and to cite the Judicial Officer for bias. Respondent here incorrectly characterizes the Judicial Officer as being both investigator and adjudicator in this case. Moreover, respondents cite the case of *Withrow v. Larkin*, 421 U.S. 35 (1976), in such a selective way as to denounce the Department's administrative procedure as placing the investigative prosecutorial, and judicial functions "all in one" (Respondents' Appeal at 27-36). This is just not the case. The Department's procedure places the investigative function in the agency (here the P&SA), the prosecutorial function in the USDA's Office of the General Counsel, the initial adjudication in an independent Administrative Law Judge, and the final agency decision in the Secretary of Agriculture's statutory surrogate--the USDA's Judicial Officer. These are separate and distinct entities, and definitely not "all in one."

Moreover, the *Withrow* decision was better interpreted by the Sixth Circuit although the opinion was in a case with very different facts than here. Nonetheless, the opinion makes it clear that those alleging bias because of combined investigative and adjudicative functions within an agency have a difficult burden of persuasion to carry, and must overcome a presumption of honesty and integrity in the adjudicator, up to the point of, but not requiring proof of actual bias or prejudgment, as follows (see, *Utica Packing Co. v. Block*, 781 F.2d 71, 77 (6th Cir. 1986) (emphasis added)):

The Supreme Court affirmed in *Withrow v. Larkin*, 421 U.S. 35, 46 (1975), that the due process requirement of a fair trial in a fair tribunal "applies to administrative agencies which adjudicate as well as to

courts." (Citation omitted). Nevertheless, the Court distinguished cases where the probability of actual bias is "too high to be constitutionally tolerable" from normal administrative adjudication:

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

*Id.* at 47.

#### B.

There can be no doubt that the requirement of separation of functions is relaxed in administrative adjudication. However, the requirement of a fair trial before a fair tribunal has not been eliminated. *Withrow v. Larkin*. This concept requires the appearance of fairness and the absence of a probability of outside influences on the adjudicator; it does not require proof of actual partiality.

Since the Judicial Officer was not engaged in any of the prejudicial activities alleged by the respondents in Issue No. 4, this proceeding distinguished as "normal administrative adjudication" and not the sort of "where the probability of actual bias is too high to be constitutionally tolerable."

Finally, claims of bias on the part of the Judicial Officer, in several proceedings, which were all rejected, were collected in a recent case called *re Rodman*, 47 Agric. Dec. \_\_\_, slip op. at 5 (Sept. 22, 1988), as follows:

Claims of bias, similar to those made by respondents here, were rejected in *Parchman v. United States*, 852 F.2d 858, 861, 863, 866 (6th Cir. 1988); *Garver v. United States*, 846 F.2d 1029, 1030-31 [(6th Cir. cert. denied, 109 S. Ct. 63 (1988))]; *Matter v. United States*, 721 F.2d 1125, 1132-33 (7th Cir. 1983); *Central Ark. Auction Sale, Inc. v. Bergland*, 570 F.2d 724, 730-31 (8th Cir.), cert. denied, 436 U.S. 95 (1978); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 430 n. 4 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983). . . .

### Complaint, ¶ VI-- The Recordkeeping Violation

In the ALJ's recommended Order (Initial Decision at 63), the following directive is given to respondents:

Respondent Crockett and respondent Cobb shall keep and maintain accounts, records, and memoranda which show the true and correct names of consignors and fully and correctly disclose all transactions involved in their business, including check-in slips, custodial checks and accounts of sale which show the true name of the consignor and are prepared in strict conformity with the requirements of section 201.43 of the regulations (9 C.F.R. section 201.43).

However, neither in the ALJ's findings (Findings 52-58), nor in the ALJ's Discussion and Conclusions (Initial Decision at 31-34)--where the ALJ addresses the recordkeeping issue--is there a *finding* that the respondents' accounts, records and memoranda do not fully and correctly disclose all transactions involved in respondents' business. The importance of such a finding is revealed in § 401 of the Packers and Stockyards Act, reproduced in Finding 54 of the Initial Decision, as follows (emphasis added):

*Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, . . .*

Consequently, there must be such a *finding* for the ALJ's recordkeeping directive to be properly in the order.

Complainant strongly supported a recordkeeping provision in "Complainant's Proposed Findings of Fact, Conclusions of Law and Order," pp. 25-26 (Sept. 19, 1986), but did not seek a civil penalty, suspension, or cease and desist provision, as follows:

Complainant has established the required non-compliance with section 401 of the Act necessary to support the imposition of a recordkeeping provision in the order issued in this proceeding. Complainant has established that respondents Cobb and Crockett wilfully entered false and deceptive entries on check-in slips, accounts of sale and custodial account checks despite prior written notice in 1981 that they were violating section 401 of the Act by not using true and correct names on accounts of sale and on other business records. (CX 3) This is an unfair practice violative of section 312(a) of the Act (7 U.S.C. § 213(a)). See, *In re Bosma*, 41 Agric. Dec. 1742 (1982); *Jacob F. Bosma v. United States Department of Agriculture*, 754 F.2d 804 (9th Cir. 1984). However, as violation of section 213(a) has not been alleged with respect to the false record allegations in paragraph VI of

the complaint, the complainant does not request the imposition of civil penalty, suspension, or cease and desist provision for the violations. Complainant seeks the appropriate affirmative recordkeeping provision pursuant to section 401 (7 U.S.C. § 221).

However, in Complainant's Reply Brief, p. 7 (Jan. 12, 1987), complainant characterizes the violation less strongly, stating that "[r]espondents' records at best incomplete and misleading when examined for such compliance. Complainant continues to seek the recordkeeping provision on appeal.

The Complaint, ¶ VI, reads in its entirety (without the table of sales dates, names and amounts), as follows:

## VI

Respondent Crockett, under the direction, management and control of respondent Cobb, in connection with the transactions specified below, issued false and inaccurate accounts of sale and custodial account checks for livestock purchased from consignment. The accounts of sale and custodial account checks failed to show the full true and correct nature of the transaction in that they failed to reflect that respondent Crockett was the actual consignor of the livestock.

In deciding against complainant on ¶ VI, the ALJ was persuaded by respondents' arguments that the records were not "false and inaccurate" because the suspect transactions were ultimately traceable (with great difficulty by P&S auditors, but still traceable) (Finding 55); that the Tennessee brucellosis program mandates the ability to trace animals (Initial Decision 33); and that a mechanically-imprinted name of one of the respondents appeared as payee before the written, named payee on some of the checks (Finding 53).

My analysis of the exhibits is that many of respondents' accounts of sale and custodial account checks are so deceptive as to be false and inaccurate. The checks have a line besides which the words "Pay To The Order of" are printed. The payee written in handwriting on that line is some entity other than respondents in transactions where respondents were, in fact, consignors (see, e.g., CX 10A, pp. 3-6; CX 10B, pp. 3-6; CX 10C, pp. 3-6). Although the name of "Crockett County Sales Co." is mechanically stamped above the payee's name, near the printed dollar amount, that would indicate to the ordinary observer that the handwritten payee is not the true payee. Rather, it would indicate to the ordinary observer that respondents have their name mechanically imprinted by their check writer alongside the mechanically imprinted dollar amount. Since copies of these checks are attached at the top of the invoices relating to these transactions, the invoices are equally false and inaccurate. At best, these checks and invoices are incomplete and misleading.

However, it makes no difference whatever whether respondents' records are "false and inaccurate," or whether they merely do not fully and accurately disclose the full, true and correct nature of the transactions. If

sufficient to support a recordkeeping order under section 401 of the Packers and Stockyards Act.

### Order

Respondent Crockett Livestock Sales Company, Inc., its officers, directors, agents, employees, successors and assigns, and respondent Danny Cobb, his agents and employees, directly or through any corporate or other device, in connection with their operations subject to Packers and Stockyards Act, shall cease and desist from:

(1) Engaging in business in any capacity for which bonding is required under the Act without filing and maintaining a reasonable bond or its equivalent, as required by the Act and regulations;

(2) Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42(c) of the regulations (9 C.F.R. section 201.42(c)) amounts equal to the proceeds due consignors for livestock purchased by respondents, their agents or employees, and amounts equal to the outstanding proceeds receivable due from other purchasers of consigned livestock; and

(3) Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. section 201.42).

Respondent Crockett and respondent Cobb shall keep and maintain accounts, records, and memoranda which show the true and correct names of consignors and fully and correctly disclose all transactions involved in their business, including check-in slips, custodial checks and accounts of sale which show the true name of the consignor and are prepared in strict conformity with the requirements of section 201.43 of the regulations (9 C.F.R. section 201.43).

Respondent Crockett is suspended as a registrant under the Act for a period of six (6) weeks, and thereafter until such time as it demonstrates that the shortage in the Custodial Account for Shippers' Proceeds has been eliminated. When respondent Crockett demonstrates that the shortage in the custodial account has been eliminated, a Supplemental Order will be issued in this proceeding terminating the suspension after the expiration of the six-week period.

Respondent Cobb is suspended as a registrant under the Act for a period of six (6) weeks.

In accordance with section 312(b) of the Act (7 U.S.C. section 213(b)), respondents Crockett and Cobb are jointly and severally assessed a civil penalty of \$5,000.

All contentions, motions, and requests of the parties have been carefully considered and to the extent, if any, not ruled upon and which are inconsistent with this Decision and Order, they are hereby denied.

The cease and desist and recordkeeping provisions of this order shall become effective on the day after service of this order. The 60-day suspension shall become effective on the 30th day after service of this order.

## APPENDIX

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 2435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

In re: DANNY COBB and CROCKETT LIVESTOCK SALES CO., INC.  
P&S Docket No. 6587.  
Stay Order filed March 8, 1989.

Enc: Paid, for Complainant.

J. Thomas Caldwell, for Respondents.

Stay Order issued by Donald A. Campbell, Judicial Officer.

The civil penalty and suspension provisions of the order previously issued in this case are hereby stayed pending the outcome of proceedings for judicial review.

The cease and desist and recordkeeping provisions shall remain in effect.

In re: CENTRAL PACKING CO., INC., d/b/a PLAT-CENTRAL FOOD SERVICES CO., INC., a/k/a PLAT-CENTRAL FOOD SERVICE SUPPLY CO., and ALBERT BRUST, an individual.  
P&S Docket No. 6898.  
Decision and Order filed February 14, 1989.

Judicial Officer affirmed Administrative Law Judge--Relevance of legislative history--all theory--State laws not controlling for piercing corporate veil.

The Judicial Officer affirmed Judge Kane's order requiring respondents to cease and desist from failing to pay, and failing to pay when due, for their purchases of meat and meat food products and issuing checks in payment for meat and meat food products without sufficient funds available in the account. The order against respondents assesses, jointly and severally, penalties totalling \$39,000, but all but \$5,000 is held in abeyance for 10 years on condition that respondents do not violate the cease and desist order. Legislative history subsequent to the original enactment of a statute is relevant in construing the original congressional intent. Legislative history of Act outlined. Failure to pay promptly for livestock or meat is a violation of the Act. The exercise of foreclosure rights by respondents' creditor bank does not constitute a violation. The order should apply to the individual who is half owner, ex-officio president and secretary, and responsible for the management of the respondent company, under the alter-ego theory. The civil penalty is authorized under the old U.S.C. § 159(b). State laws are not controlling in determining whether the corporate veil should be pierced. Complainant need not prove that conduct is likely to produce injury to others where the practice is clearly unfair. It is the duty of the agency to stop unlawful practices on their inception.



This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).<sup>\*</sup> An initial Decision and Order was filed on August 9, 1988, by Administrative Law Judge Paul Kane (ALJ) ordering respondents to cease and desist from failing to pay, and failing to pay when due, for their purchases of meat and meat food products, and issuing checks in payment for meat and meat food products without sufficient funds available in the account. The order against respondents assesses, jointly and severally, civil penalties totalling \$39,000, but all but \$5,000 is held in abeyance for 10 years on condition that respondents do not violate the cease and desist order.

On September 13, 1988, respondents appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>\*\*</sup>

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, with trivial changes or additions indicated by brackets, and omissions indicated by dots. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

### ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This decision is promulgated pursuant to the Administrative Procedure Act, as amended, 5 U.S.C. §§ 554, 557 and the Rules of Practice of the Department of Agriculture governing formal adjudicatory administrative proceedings, 7 C.F.R. § 1.130 *et seq.*

The respondents in this matter are alleged to have violated § 202(a) of the Packers and Stockyards Act of 1921, as amended and supplemented (hereinafter occasionally referred to as the "Act") (7 U.S.C. § 192(a)), upon the issuance of the Department's complaint filed June 16, 1987. This section of the Act specifies that:

"It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler

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<sup>\*</sup>See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1988 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, *Agricultural Law*, ch. 71 (1980).

<sup>\*\*</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450e-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted* in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

to: (a) engage in or use any unfair, unjustly discriminatory, or deceptive practice or device;"

The Act defines those subject to these prohibitions as follows (7 U.S.C. § 191):

"When used in this chapter the term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer or distributor in commerce."

The Act further expresses these definitions (7 U.S.C. § 182):

"(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "meat food products" means all products and by-products of the slaughtering and meat packing industry - if edible;

(11) The term "commerce" means commerce between any State, Territory or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia."

The Act further defines transactions in commerce at 7 U.S.C. § 183. However, in view of the admissions made in this case, further examination of the term "commerce" is not necessary.

The Act further provides at 7 U.S.C. § 193 that:

"(b) If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this subchapter covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation . . . . The Secretary may also assess a civil penalty of not more than \$10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the

business involved, and the effect of the penalty on the person's ability to continue in business."<sup>1</sup>

The allegations of the complaint center upon the business practices of the corporate respondent, Central Packing Co. Inc., and its Executive Vice President, Mr. Albert Brust, during a period in 1985 and 1986. These business practices generally resulted in the failure to pay for the purchases of meat and meat food products when payment for such was due; by failing to pay for purchases of meat and meat food products; and by purchasing meat and in purported payment thereof, issuing checks which were returned unpaid by the bank upon which they were drawn. The complaint specifically alleges that the respondents failed to pay, when due, 14 distributors \$428,900.27 in transactions for the purchase of meat and meat food products occurring between November 1985 and June of 1986. The complaint further alleges that these respondents had not paid for these purchases as of September 26, 1986. The complaint also specifically alleges that these respondents had issued checks returned to the payees marked "NSF", meaning insufficient funds were deposited in the payor's bank for payment to the payees between March of 1986 and May of 1986 on purchases of meat in 126 transactions.

Paragraphs 1(a) and (b) of the complaint allege that Central Packing Co. Inc., was a Colorado corporation, engaged in the marketing of meat and meat food products in commerce and was a packer subject to the provisions of the Act. Paragraphs 1(c), (d) and (e) of the complaint allege that the individual, Mr. Brust, was engaged in marketing meat and meat food products in commerce and was a packer subject to the provisions of the Act.

The answer filed by and on behalf of the respondents on July 27, 1987 denies the allegations of the Department's complaint. The answer indicates that Mr. Brust was the Executive Vice President and Secretary of the corporation and owned 50 percent of G-A Management Group Inc., which owned all of the outstanding stock of the corporate respondent. The answer admits that the corporate records indicated that of the suppliers listed in the complaint, \$425,462.75 was owed to 13 suppliers and that "... all unpaid checks have been included in sec. II(a) above ...." The respondents' answer to the complaint avers that the financial difficulties were induced and enhanced as the result of actions taken on a unilateral basis by a banking corporation creditor to the corporate respondent.

Counsel to the Department of Agriculture have advanced a proposed order which would prohibit the respondents from prospective violations of the Act and would extract from the respondents, jointly and severally a civil penalty in the amount of \$39,000 of which \$34,000 would be held in abeyance for a period of 10 years, provided no future violation of the ... Order should occur.

Pursuant to prehearing Orders issued in this matter, a hearing was conducted on December 2, 1987, before the undersigned in Denver, Colorado.

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<sup>1</sup>The Administrative Procedures Act further provides, 5 U.S.C. § 558(b) that

<sup>2</sup>A sanction may not be imposed ... except within jurisdiction delegated to the

The interests of the Department were represented by Edward Silverstein Esq., and the interests of the respondents were represented by Craig D. Joy Esq., of Denver, Colorado. At this hearing, exhibits and stipulations were advanced and received into the record and testimony was taken and received from six witnesses. Briefs and proposed findings were filed by counsel January 27, 1988, February 27, 1988, and March 18, 1988.

Upon a consideration of all the matters of record, the following findings of fact are made and conclusions of law are reached. As a result thereof there is attached hereto the Order as requested by complaint counsel.

### Findings of Fact

1. Central Packing Co. Inc., hereinafter "CPC" is a Colorado corporation doing business under the assumed name of Plat-Central Food Services Inc., which was engaged in the sale and distribution of meats to hotels and restaurants. (CX-4; TR 82)<sup>2</sup> CPC had its principal place of business in Boulder, Colorado, with a mailing address at 6123 Arapaho Ave., Boulder, Colorado 80303. (CX-2, CX-4)

2. CPC was, at all relevant and material times: (a) engaged in the business of preparing and marketing meat and meat food products (TR 146 and 156) for sale and shipment as a wholesale broker, dealer, and distributor in commerce; (b) a packer within the meaning of and subject to the provisions of the Act. (CX-4, CX-5, pp. 9, 11, 13, 15, 17, CX-6, p. 6)

3. Mr. Albert Brust is an individual whose mailing address is 1020 E. Girard, Suite 340-C, Denver, Colorado 80231. (TR 125)

4. Mr. Brust, at relevant and material times, was . . . (b) Executive Vice President and Secretary of CPC; (TR [34,] 163-4), (c) owner of 50 percent of the corporate stock of G-A Management Group Inc., which owned 100 percent of the stock of CPC; (Answer, p. 2) (d) responsible for the direct management and control of CPC. (TR 38-39, 50-51)

5. (a) Mr. Brust was, at all relevant and material times engaged in the business of preparing and marketing meat and meat food products for sale and shipment as a wholesale broker, dealer, or distributor in commerce. Employees of the corporate respondent reported directly to Mr. Brust. (TR 185-86) Mr. Brust dealt directly with customers. (TR 137) Mr. Brust signed checks in payment for meat and meat product purchases. (CX-5, p. 3; CX-6, pp. 4, 8, 12, 16, 20, 27, 34, 38, 43, 47, 52, 56, 63, 66, 70 and 74). Mr. Brust testified "I was running the company on an overdraft." (TR 135) Mr. Brust had management, direction and control was immediate and intimate as demonstrated in his several agreements with CPC's creditor bank. The bank provided for the personal guarantee of CPC's debt by Mr. Brust [(in the event of fraud, wilful disregard of the contract, etc.),] and an agreement to supervise the liquidation of CPC (TR 150); (b) Mr. Brust was, at all relevant

<sup>2</sup> Counsel proposed a stipulation at TR 16 that the respondent did not trade in the name of Plat-Central Food Service Co. However, the transcript does not record the acceptance or denial of this proposed stipulation. References to the transcript of the hearing on December 2, 1987, in Denver, Colorado, will be referred to as "TR".

material times, a packer within the meaning of and subject to the provisions of the Act. (Finding 5(a))

6. On or about the dates and in the transactions set forth below, respondents purchased meat and meat food products and failed to pay, when due, and indeed had failed to pay prior to July 27, 1987, for such purchases.<sup>3</sup>

Name of Distributor	Invoice Dates	Number of Transactions	Amount Due
A.M.Y. Distribution Denver, CO	05/06/86- 06/10/86	10	\$84,256.44
Bar-S Foods Co. Denver, CO	05/27/86- 06/03/86	3	6,857.81
Colorado Lamb Company Denver, CO	05/05/86- 06/05/86	8	8,413.71
Custom Corned-Beef, Inc. Denver, CO	03/10/86	1	2,922.82
Denver Boneless Beef Co. Denver, CO	03/18/86- 06/06/86	32	74,902.27
Downing Company Parker, CO	04/07/86- 06/02/86	9	11,055.69
Gold Star Sausage Co. Denver, CO	11/26/85- 01/10/86	5	4,353.80
Lean Limousin Beef Co. Holdrege, NE	05/21/86- 06/06/86	2	13,643.10
Loveland Foods Loveland, CO	05/07/86- 06/04/86	10	22,794.35
Sunrise Beef Packer, Inc. Gordon, NE	12/19/85- 03/19/86	15	91,817.83

<sup>3</sup>The complaint at paragraph 11 alleges that the corporate respondent had failed to pay when due \$428,900.27. The complaint also alleges that of this amount, \$71,763.09 was owed to Century Meats. The proof at trial indicates that Century Meats had obtained a security interest in equipment owned by the corporate respondent. Therefore the dollar amount which the corporate respondent had failed to pay when due to Century Meats is not included within the tabulation in this finding. The answer expresses "CPC's records indicate that the amounts due to suppliers listed on the complaint to be" as stated in the body of this finding. Therefore the answer filed July 27, 1987, not only admits that these suppliers were not paid when due, but also that they had not been paid as of that date. See also the complaint and CX-5, CX-6, TR 17-18, 22-24.

Name of Distributor	Invoice Dates	Number of Transactions	
Sterling Beef Co. St. Morgan, CO	Unknown	Unknown	1
Valhalla Trading Co. Philadelphia, PA	02/19/86	1	—
	Total		\$35

7. The evidence received during the hearing in this matter reveals suppliers identified in Finding 6 above had not been paid the debts set forth opposite their respective names for the purchases of meat food products prior to December 2, 1987. (TR 45-46, 135, 140, 144)

8. On or about the dates and in the transactions set forth respondents purchased meat and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn the respondents had not maintained sufficient funds to pay such checks presented. (Complaint paragraph 3; Answer p. 3; TR pp. 40-44, 5, 79; CX 6)

Seller	Check No.	Check Date	Check Amount	Date of Return
A.M.Y. Distributor Denver, CO	11180	05/16/86	\$ 5,318.06	06/03/86
	11181	05/16/86	3,421.16	06/06/86
	11183	05/23/86	8,217.33	06/06/86
	11184	05/23/86	7,431.42	06/11/86
Century Meat Packing Inc., Denver, CO	11144	05/16/86	2,949.16	06/11/86
	11197	05/23/86	13,214.17	05/23/86
Dewer Boneless Beef Co., Denver, CO	10844	03/21/86	8,530.15	05/27/86
	11176	03/28/86	4,820.50	06/06/86
	11177	03/28/86	2,401.70	06/06/86
	11232	04/11/86	2,506.87	06/06/86
	11235	04/11/86	2,179.74	06/11/86
Downing Company Parker, CO	10911	04/04/86	1,855.61	06/05/86
Lean Limousin Beef Co., Holdrege, NE	11214	05/29/86	17,862.70	05/23/86
Loveland Foods Loveland, CO	11161	05/16/86	1,308.13	06/06/86
	11233	05/23/86	4,086.24	06/11/86
	11234	05/23/86	2,382.53	06/11/86

9. The First Interstate Bank of Denver which held a secured position as a prime creditor of CPC and to which all of the capital stock of G-A Management was pledged as security for loans forced the execution of a liquidation agreement on June 8, 1986. (TR 179-80) CPC has been liquidated. (TR 151, 154) It presently has no assets and no value other than as a 4 million dollar tax-loss. (TR 156) CPC's total sales volume during 1985 was approximately 10 million dollars. (TR 130-131) The First Interstate Bank of Denver had advised Mr. Brust of its concern with the financial condition of the CPC in August of 1985. (TR 172)

10. Mr. Brust did not have experience in the meat distribution industry when he assumed a position with CPC in 1982. (TR 166, 168) However his personal commitment and participation in the management and control of CPC was required by the creditor bank, First Interstate Bank of Denver. (TR 32, 33, 127, 150) Mr. Brust pursued this activity in order to obtain substantial economic gain should he be able to reverse the serious economic and financial difficulties which the corporation experienced in 1982. (TR 28, 30-31, 127-129) Mr. Brust was responsible for CPC. (TR 38-39, 50-51) He was never able to obtain prolonged financial success as he operated the company on over-drafts. (TR 135) Mr. Brust remained as an officer and director of CPC until October or November of 1986. (TR 163)

11. Mr. Brust has received remuneration for his efforts in the liquidation of the assets of CPC. The corporation accomplishing this feat has received at least \$70,000 in liquidator's fees. (TR 153) Mr. Brust's salary from this liquidator has totaled at least \$20,000. (TR 153)

12. Mr. Brust personally owns no identifiable assets. (TR 190) The adjusted gross income for Mr. Brust and his spouse in 1984 was approximately \$31,000 all of which was due to Mr. Brust's spouse's activities. The couples' adjusted gross income in 1985 was \$41,300 of which approximately \$30,000 was due to Mr. Brust's spouse's efforts and in 1986 Mr. Brust received a personal reported income of approximately \$17,300. (TR 161)

13. It was the testimony of the Department's official responsible for expressions of sanction policy that the failure to pay, and the failure to pay when due, for meat and meat food products are considered to be serious violations of the Act, as is the issuance of checks which fail to clear banking channels because of insufficient balances in the accounts on which they are issued. In addition it was the testimony of this individual that such practices are considered to be unfair and or deceptive in violation of § 202 of the Act. (TR 94-97)

#### Conclusions Alter Ego Theory

The Act prohibits unfair or deceptive practices<sup>4</sup> in transactions involving the sale of meat or meat food products. The corporate respondent, CPC, formerly doing business in Boulder, Colorado, was admittedly engaged in the business of preparing meat and meat food products for sale or shipment in

<sup>4</sup> 7 U.S.C. § 192(a).

commerce.<sup>5</sup> Although respondents' counsel contends otherwise,<sup>6</sup> individual respondent, Mr. Brust, was so inextricably linked to this corporate activity, (Finding 5) that Mr. Brust was the *alter ego* of CPC and is considered a "packer", engaged in the business of selling meats and products in commerce as defined in the Act. Mr. Brust was personally responsible for the execution of the checks to suppliers which were dishonored by CPC's bank. He was responsible for the direction and control of activities of employees of CPC. (Finding 5) Additionally, Mr. Brust was himself the only voice of authority as an officer of CPC in the corporate management subsequent to the withdrawal of the former president, J. R. Privett, in 1984. This authority was exercised on a day-to-day basis. (TR 131) Mr. Brust's testimony in this regard is most informative:

"Yes, *I built up the sales* to almost--well, in fact, we were over \$10 million in 1985" (emphasis added) (TR 130-131).

Although the capital stock of CPC was pledged as collateral to the First Interstate Bank of Denver to secure CPC's debt, 50 percent of CPC's equity was indirectly owned by Mr. Brust. (Finding 4) Indeed, Mr. Brust's personal direction and control of CPC was most clearly and emphatically displayed upon his commitment to CPC's primary secured creditor that he would not only personally guarantee payment of CPC's corporate debt to that creditor [(in the case of fraud, wilful disregard of the contract, etc.)], but also that he would personally supervise the liquidation of CPC's assets should failure which ultimately consumed the business, visit CPC. (TR 150)

Mr. Brust became involved with CPC in 1982 when he was presented with the prospects of financial gain in a so-called "turn around situation." (TR 129) He responded to this opportunity by investing his time, talents and personal capital, which amounted to \$250,000. (TR 45) CPC was engaged in the business of distributing meat to restaurants. (TR 136, 138) It purchased packaged cuts of beef, pork, veal and lamb from suppliers located within Colorado and beyond Colorado's boundaries in Nebraska, Pennsylvania, (C 5, 6). CPC's sales were adversely affected by a display of cross-elasticity demand through a change in consumption habits, i.e. alternative sources of protein gained consumer preference (TR 138), and CPC's major supplier of beef ceased the sale of product to it in January of 1986. (TR 133) This resulted in an increase in costs of procurement, accelerated the operational losses (TR 134), and resulted in the operation of CPC by Mr. Brust in

<sup>5</sup> Respondents' proposed Findings of Fact, and Conclusions of Law, filed February 29, 1989, p. 1. The respondents appear to have functioned as "purveyors" as the word was used in *U.S. v. Wallace*, 105 F.2d 848, 852 (7th Cir. 1939) (TR 138).

<sup>6</sup> Respondents' counsel have not argued that the activities of respondents were those of retailers, so as to escape the proscriptions of this section of the Act. 61 Cong. Rec. Pt. 2 II 11 (May 27, 1921) (statement of Mr. McLaughlin). However, see also H.R. Rep. 1048 to accompany H.R. 9020, 85th Cong., 1st Sess. 5215 (1957).

<sup>7</sup>Id. p. 2.



"overdraft" situation. (Finding 5) This ultimately led to the issuance of worthless checks to suppliers<sup>7</sup> for purchases between March and June 1986. (Findings 6, 7)

Thereafter, the Packers and Stockyards Administration initiated an investigation of CPC in June and July of 1986 upon the inquiry by one of CPC's suppliers, which was then holding a worthless check issued by CPC in the amount of \$17,862.70 (Finding 8) for the interstate shipments of beef products to CPC (CX 6, p. 62, 63). Mr. Brust was the only management employee at CPC with whom the Department's investigator dealt and Mr. Brust directed that the investigator obtain access to CPC's books and records. Mr. Brust was aware of the circumstances of the grievance brought to the Department by this supplier. (TR 82-85)

The issue at the present focal point is the responsibility and involvement of Mr. Brust as a packer within the meaning of the Act. He was an owner of the corporate respondent, an officer and a personal creditor. He directed and supervised the activities of the corporate respondent. He directly engaged in contacts with suppliers, customers and federal investigators. He personally issued worthless checks to suppliers and he personally guaranteed the debts of CPC [see Finding 5]. And, he agreed to personally supervise the liquidation of CPC. Accordingly, it is appropriate to conclude that Mr. Brust was personally a "packer" as defined in the Act, and, as such, is subject to its prohibitions and censures upon a failure to observe its proscriptions.<sup>8</sup>

The establishment of Mr. Brust as the *alter ego* of CPC is a question of fact. *Wolfe v. United States*, 798 F.2d 1241, 1243 Ftn. 2 (9th Cir. 1986).

\*Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy.\* *Bangor Punta Operations, Inc. v. Bangor & Aroostock Railroad Co.*, 417 U.S. 703, 713, 94 S. Ct. 2578, 2584.

Additional clarification of this principle was expressed in *McKenney v. Gannett Co.*, 817 F.2d 659, 666 (10th Cir. 1987):

\*The alter ego theory has been adopted by courts in those cases where the idea of separate corporate status has been used to work an

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<sup>7</sup>Some of these suppliers participated in an informal creditors meeting in May of 1986 (TR 45, 55-56) held for the purpose of obtaining assurances that payments would be made on the sale of products to CPC. Apparently, upon expressions by the secured creditor, the Bank's Mr. Dino, that it would approve the sale of the business to a prospective purchaser brought onto the scene by Mr. Brust, (TR 45-46) the unsecured suppliers continued their transactions with CPC. (TR 56) These suppliers were undoubtedly chagrined to learn of the foreclosure of CPC's assets, including CPC's checking accounts by the secured creditor in June of 1986. (Finding 9)

<sup>8</sup>It is not clear from this record if the Bank's exercise of its secured creditor position did not fetter the packers' statutory trust for cash sellers benefit in violation of the Act at 7 U.S.C. § 196(a), (b). At any rate, such an allegation was not advanced in this matter.

injustice . . . Piercing the corporate veil through the alter ego doctrine is an equitable remedy."

The Supreme Court of Colorado, the state within which respondents conducted their affairs, has addressed the issue in *Gude v. City of Lakewood*, 36 P.2d 691, 697 (Supreme Court Colo., 1981) as follows:

"Where the alter ego doctrine applies, a court will disregard a corporate entity, or pierce the corporate veil, and consider the actions ostensibly taken by the corporation to be those of its shareholders. In *Fink v. Montgomery Elevator Co.*, 161 Colo. 342, 421 P.2d 735 (1966), we considered the circumstances which make that doctrine applicable and stated:

In 1 Fletcher, *Cyclopedia of Corporations*, § 41.1 it is stated in this regard:

" . . . to establish the alter ego doctrine it must be shown that the stockholders' disregard of the corporate entity made it a mere instrumentality for the transaction of their own affairs; that there is such unity of interest in ownership that the separate personalities of the corporation and the owners no longer exist; and to adhere to the doctrine of corporate entity would promote injustice or protect fraud."

161 Colo. at 350, 421 P.2d at 739; accord, *Industrial Commission v. Lavach*, 165 Colo. 433, 439 P.2d 359 (1968); *Contractors Heating and Supply Co. v. Scherb*, 163 Colo. 584, 432 P.2d 237 (1967); *Hill v. Deamin, Colo. App.*, 609 P.2d 127 (1980); *Rosebud Corp. v. Boggio*, 39 Colo. App. 84, 561 P.2d 367 (1977)."

This theory was further followed in Colorado in *Reader v. Dertel Associates Marketing*, 693 P.2d 398, 399 (Colo., app. 1984), which held:

"If the corporate veil is pierced by application of the alter ego doctrine, stockholders may be held personally liable for corporate obligations. This doctrine arises in cases where the corporate entity has been used to defeat public convenience, or to justify or protect wrong, fraud, or crime, or in other similar situations where equity requires. *Fink v. Montgomery Elevator Co.*, 161 Colo. 342, 421 P.2d 735 (1966)."

^ established federal policy that cattlemen and those who sup

public interest. The conclusion is thus that Mr. Brust is to stand where CPC stood.

### Violation of Statute

These respondents are charged<sup>9</sup> with the violation of but one section of the Packers and Stockyard Act,<sup>10</sup> a statute written by a Congress<sup>11</sup> intent upon curbing antitrust practices in the livestock and meat industries.<sup>12</sup>

The Supreme Court's initial consideration of the Act's constitutionality provided an analysis of the Congress' intent in regulating meat packers and stockyard operators. Chief Justice Taft wrote in *Stafford v. Wallace*, 258 U.S. 495, 514-5, 42 S. Ct. 397, 401 (1922):

"The chief evil feared is the monopoly of the packers, enabling him unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil, which it sought to provide against by the Act, was exorbitant charges, duplication of commissions, deceptive practices in respect to prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust

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<sup>9</sup>The respondents are not alleged to have violated any regulation promulgated by the Department of Agriculture.

<sup>10</sup>See page 1 herein.

<sup>11</sup>The Bills of this statute were drafted by the 67th Congress.

<sup>12</sup>The Department's counsel has cited only (Complainant's Proposed Findings of Fact, Conclusions of Law and Order, p. 6, filed January 27, 1968) a House Report of the 85th Congress as dispositive of the [67th] Congress' intent in expressing these statutory prohibitions. However, it appears that congressional intent in the enactment of the 1921 statute is to be searched with compelling results, for the subsequent legislative history, cited by counsel, does not necessarily relate to the acts and practices which the 1921 Congress sought to prohibit. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, [116-20.] 100 S. Ct. 2051, 64 L.Ed.2d. 766; *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, [758.] 99 S. Ct. 2066, 60 L.Ed.2d 609 on remand 602 F.2d 181; see also *Sutherland Stat Const* § 49.11 (4th Ed.). [Nonetheless, later legislative history is sometimes noted in construing earlier legislation. (*United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 590 (1957); *MLRB v. Lion Oil Co.*, 352 U.S. 282, 291 (1957)), and may be given weight as an expert opinion (*United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1985); *Barnes v. Cohen*, 749 F.2d 1009, 1015-16 (3d Cir. 1984), cert. denied, 471 U.S. 1061 (1985)).]

or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce."

The section of the Act which the Department seeks to enforce in this matter was included in H.R. 6320 which was reported to the House of Representatives by Representative Haugen of Iowa,<sup>13</sup> the Chairman of the Committee of Agriculture. Mr. Haugen advised:<sup>14</sup>

"... the bill reported herewith places the jurisdiction over both the packers and stockyards in the Secretary of Agriculture. It has been worked out with great care and painstaking, with a view of providing a constructive measure that would properly safeguard the interest of the public and all elements of the industry from the producer to the consumer without destroying any unit of it.

A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

The Secretary of Agriculture is given jurisdiction over the packers, stockyards, commission men, traders, buyers, and sellers in the stockyard, thereby dispensing with the necessity of creating new commissions, bureaus, etc., duplicating existing machinery. He has the power, under this bill, to gather and compile information concerning, and to investigate from time to time the organizations conduct, practices, and management of the packers business and stockyards, including all transactions in and about such yards by all concerns or persons dealing at the yards. He has the power to require reports and answers, under oath, or otherwise, as often as he may deem necessary concerning all such matters. He has the power, by subpoena, under the provisions of the bill to conduct hearings, to require the production of books, papers, and documentary evidence and to require the attendance of witnesses. The Secretary is given the power, under the act making appropriation for the current year, to be thus applied, to gather and promulgate all such information, including that relating to the demand, supply, consumption cost and prices of, and the facts relating to the production, manufacture, storage, and distribution of live stock and live stock products. In this bill he is given the further power to prescribe the manner and form in which the packers, stockyards, and all other concerns operating in said yards, shall keep their books and accounts. He is given the power to prevent packers, stockyards,

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<sup>13</sup>H.R. Rep. No. 77, 67th Cong., 1st Sess.

companies, and all persons dealing in the stockyards from engaging in unfair, unjustly discriminatory or deceptive practices or devices. He is given the power to regulate and prescribe the practices on the stockyards, to prevent abuses and may award damages in redress of any unfair practices or abuses. He is given the power to regulate and prescribe all rates, fees, and charges for service in the stockyards, including the fees of commission men."

Just as the introduction of this bill featured and highlighted the prospective delegation of authority to the Secretary to proscribe ". . . unfair, unjustly discriminatory or deceptive practices or devices", so too did the floor debate emphasize that the Secretary was to elucidate the scope and nature of acts and practices which would be considered unfair or deceptive.

The House was apprised:<sup>15</sup>

"Industry is progressive. The methods of industry and of manufacture and distribution change from day to day, and no positive iron-clad rule of law can be written upon the statute books which will keep pace with the progress of industry. So we have not sought to write into this bill arbitrary and iron-clad rules of law. We have rather chosen to lay down certain more or less definite rules, rules which are sufficiently flexible to enable the administrative authority to keep pace with the changes of methods in distribution and manufacture and in industry in the country. Do the gentlemen who oppose this legislation object to prohibiting unfair practices and devices in commerce? Do they desire that the business of the country, or any of it, shall continue to use unfair methods or devices in commerce? Do they object to prohibiting discriminations against localities or against persons of this potentially and actually powerful industry?

Do they object to prohibiting these industries from conspiring or agreeing with each other to monopolize the food industry of the country? No. I do not think that they object to that, although the position that they take would seem to indicate that they do. If we are going to have any sort of supervision of this industry we must set up some agency which can acquire the necessary technical and practical information in regard to the operation of the industry and the manufacture and distribution of the products involved, so that that agency can deal with the offenses committed on the basis of the actual knowledge gained over a considerable period of time."

Additionally, it was stated:<sup>16</sup>

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<sup>15</sup>61 Cong. Rec. Pt. 2 H 1887 (May 27, 1921) (statement of Rep. Anderson).

<sup>16</sup>61 Cong. Rec. Pt. 2 H 1873 (May 27, 1921) (statement of Rep. Parker.)

"If anyone will take the pains to read that report from end to end, he will be interested in some things. The Secretary, who has supervision of the regulation, has the right to decide what is reasonable or unreasonable, or what he thinks will be in restraint of trade, or what he thinks will raise or lower prices, and he has the right to make orders which are equivalent to an injunction."

Concerns with the constitutionality of the prospective act were displayed in the following expression:<sup>17</sup>

"The bill makes unlawful certain acts on the part of the packers. It prohibits, for instance, unfair, unjust, discriminatory, or deceptive practices or devices. I think it will be at once admitted that a flat prohibition of that sort, followed by a criminal penalty, to be enforced in a court, would be held to be unconstitutional, just as it was held to be unconstitutional in the case of the Lever Act. That is to say, the provisions of this act are not sufficiently definite to stand as a basis of criminal prosecution directly. Therefore we have sought to interpose an administrative agency - the Secretary of Agriculture - who does not act as a court, but as an administrative officer, and he finds whether certain acts committed by the person charged with them are acts prohibited by the statute."

An opponent of the legislation spoke to the delegation of authority to the Secretary as follows:<sup>18</sup>

"Gentlemen of the committee, think what we do in this legislation. We provide in section 202 that it shall be unlawful for any packer to engage or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce.

There is not a man sitting in this committee that knows what that means. It covers the whole field of the practice of the packers; it is not a restriction dealing with prices. I asked the gentleman from Minnesota [Mr. Anderson] that question the other day, and he responded that it was not the purpose to deal with prices. What do you undertake to deal with under section 202 when you say it shall be unlawful to engage in or use any unfair, unjustly discriminatory or deceptive practice in commerce? Nobody knows; you leave to the Secretary of Agriculture the whole field of the activity of the packers to say what is a deceptive practice or a discriminatory practice or what is unfair. He has a roving commission to go into every phase of the matter and to determine it, and then as an executive officer of the Government issue his arbitrary decree in the form of an order

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<sup>17</sup>61 Cong. Rec. Pt. 2 H 1920 (May 31, 1911) (statement of Rep. Anderson.)

forbidding the packers in this great business to continue what their best judgment tells them to do.

It may be a bad practice and it may not be, but we leave to the Secretary of Agriculture the arbitrary power of issuing an order.\*

And, the Chairman of the Committee declared:<sup>19</sup> "But the Secretary of Agriculture determines what is unlawful."

The rationale of the House in considering this bill was expressed by a proponent, who stated:<sup>20</sup>

"In conclusion I want to say I am not particularly concerned over the fact that these packers make large profits. If they are good business men and manage their businesses properly, I want them to have a profit, but I want them to do business on the square. I want them so regulated that they are going to do business on the same basis that every other man in the same industry does.

There is nothing in this bill that any honest packer can object to. Their practices have not been in accordance with law, and the Secretary under this bill is given power to make rules that will make them do business on the level."

Subsequent to the enactment of this legislation in 1921, the Secretary of Agriculture has exercised the granted authority and has determined that the failure to pay, in a timely manner and fashion, for the purchases of either livestock or meat is not "... on the square ...," and has condemned such a failure as an unfair or deceptive practice violative of section 202(a) of the Act.<sup>21</sup> The Secretary's determinations that these practices are prohibited as "unfair" are found in the following cases: *Rotches Pork Packers, Inc.*, 46 Agric. Dec. 573 (1987) (Sec. 202(a)--Meat); *Mid-West Veal Distributors*, 43 Agric. Dec. 1124, 1138 (1984) (Sec. 202(a)--Livestock); *DeLong Packing Co.*, 36 Agric. Dec. 1181, 1205-6 (1977), *aff'd as DeLong Packing Co. v. U.S.*, 618 F.2d 1329 [(9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980)] (Sec. 202(a)--Livestock); *Samuel M. Rosenthal*, 36 Agric. Dec. 210, 220-1 (1976) (Sec. 202(a)--Meat); *R & D Investments*, 35 Agric. Dec. 668, 670 (1976) (Sec. 202(a)--Livestock); *San Jose Valley Veal, Inc.*, 34 Agric. Dec. 966, 982 (1975) (Sec. 202(a)--Livestock); *Cleve Farm Packing Co. Inc.*, 31 Agric. Dec. 747, 757 (1972) (Sec. 202(a)--Livestock); *Jacob Wesel*, 31 Agric. Dec. [776, 784] (1972) (Sec. 202(a)--Livestock); *AAA Meat Packing Co.*, 31 Agric. Dec. 543, 550 (1972) (Sec. 202(a)--Livestock); *Hass-Davis Packing Co., Inc.*, 29 Agric. Dec.

<sup>19</sup>61 Cong. Rec. Pt. 2 H 1931 (May 31, 1921) (statement of Rep. Haugen).

<sup>20</sup>61 Cong. Rec. Pt. 2 H 1868 (May 27, 1921) (statement of Rep. Voight).

<sup>21</sup>See also, *Amper Meats Corp.*, F.&S. Docket No. 6834, Decision by Judge Baker, June 3, 1938.

1249, 1251 (1970) (Sec. 202(a)--Livestock); *Burlison Packing Company*, Agric. Dec. 1166, 1174 (1970) (Sec. 202(a)--Livestock); *American Kosh Provisions, Inc.*, 28 Agric. Dec. 1248, 1253 (1969) (Sec. 202(a)--Livestock); *J. Doctorman & Son, Inc.*, 28 Agric. Dec. 840, 855-9 (1969) (Sec. 202(a)--Livestock); *S.M. Jamison, d/b/a Y-J Packing Co.*, 28 Agric. Dec. 581, 5 (1969) (Sec. 202(a)--Livestock); *Sebastopol Meat Co., Inc.*, 28 Agric. Dec. 474, 441 (1969) (Sec. 202(a)--Livestock), Aff'd 440 F.2d 983 (9th Cir. 1971); *Fotinos Bros. Meat Co., Inc.*, 27 Agric. Dec. 1429, 1430-1 (1968) (Sec. 202(a)--Meat); *Award Meat Packing Co.*, 27 Agric. Dec. 625, 637 (1968) (Sec. 202(a)--Livestock); *Kurtz G. Schmitz & H.G. [Silva]*, 27 Agric. Dec. 435, 438-9 (1968) (Sec. 202(a)--Livestock); *Delrich Meat Packers, Inc.*, 24 Agric. Dec. 41, (1965) (Sec. 202(a)--Livestock); *R.J. & C.W. Fletcher, Inc.*, 23 Agric. Dec. 1403, 1403 (1964) (Sec. 202(a)--Livestock); *George Ash*, 22 Agric. Dec. 889, 8 (1963) (Sec. 202(a)--Meat); *Eastern Meats, Inc.*, 21 Agric. Dec. 134, 141 (1963) (Sec. 202(a)--Meat); *Goldring Packing Co., Inc.*, 21 Agric. Dec. 26, 31 (1963) (Sec. 202(a)--Livestock); *Rosenthal Packing Co.*, 19 Agric. Dec. 971, 972 (1963) (Sec. 202(a)--Livestock); *Central [California] Livestock, Inc. d/b/a Machi Meat Packing Co.*, 15 Agric. Dec. 97, 110-111 (1956) (Sec. 202(a)--Livestock); *Flicker Packing Co., Inc.*, 12 Agric. Dec. 138, 140 (1953) (Sec. 202(a)--Livestock); *Berry Packing Co., Inc.*, 9 Agric. Dec. 1205, 1206 (1950) (Sec. 202(a)--Livestock); *Quaker Packing Co., Inc.*, 8 Agric. Dec. 1334, 1340 (1949) (Sec. 202(a)--Livestock); *W.L. Harris*, 8 Agric. Dec. 689, 692 (1949) (Sec. 202(a)--Livestock); *Louis A. Cross*, 8 Agric. Dec. 686, 688 (1949) (Sec. 202(a)--Livestock); *Fred A. Ainsbinder*, 7 Agric. Dec. 288, 295 (1948) (Sec. 202(a)--Livestock).<sup>22</sup>

The Federal circuit courts appear to have not yet expressed a rationale condemning the failure to timely pay for purchases of livestock or meat as an "unfair act or practice" in violation of Sec. 202(a) of the Act. However, several cases do define certain other "acts and practices"<sup>23</sup> which have been considered violative of this specific section of the Act. These cases and the common understandings of the word "unfair" lead to the conclusion that respondents' failure to timely pay for meats it subsequently sold to its customers was indeed, not "... on the square ..."<sup>24</sup> and hence violative of the Act.

In 1939, the Seventh Circuit (Chicago) applied a rule of reason in determining that acts and practices involving credit discrimination, monopolization and restraints of commerce, and preferential price discount

<sup>22</sup>Secondary history suggests that findings of Sec. 202(a) of the Act of violations, upon failure to pay for livestock or meat purchases, were entered as early as 1936. *Secretary Agriculture v. Leo Schloss Inc.*, BIA Docket Number 1105, decided July 2, 1938; *Secretary Agriculture v. Leo Schloss Inc.*, BIA Docket Number 708, decided October 29, 1937; *Secretary*



were not violative of Sec. 202(a) of the Act. *Swift & Co. v. Wallace*, 105 F.2d 848, 863 (7th Cir. 1939). The court determined that exigencies of the business world justified a packer's conduct. But, there is no suggestion in this opinion that the same rule of reason would be applied to a failure to timely pay, or indeed a failure to pay at all for livestock or meat purchases.

The failure to timely pay for livestock purchases has been twice determined to be violative of Sec. 312(a) of the Act. In *Bowman v. U.S.*, 363 F.2d 81, 85 (5th Cir. 1966), the court considered the remedial character of the Act, liberally construed Congress' intent and concluded: "Failure to pay would be a proscribed *deceptive practice* under § 213(a)". . .<sup>25</sup> (emphasis added). And, in *Van Wijk v. Bergland*, 570 F.2d 701 (8th Cir. 1978), the court wrote, in sustaining a conclusion of violation of Sec. 312(a):

"Timely payment in a livestock purchase prevents the seller from being forced, in effect, to finance the transaction. By insuring that the seller will receive the fair market value of his livestock, undiminished by the cost of financing the sale, the requirement that a purchaser make timely payment fulfills the purpose of the Act." *Id.*, 704.

The phrase, ". . . unfair, unjustly discriminatory, or deceptive practice or device . . ." of the Act at Sec. 202(a) has been taken to prevent: a conspiracy to force terms of sale, *DeLong Packing Co. v. U.S. Dept. of Agriculture*, 618 F.2d 1329 [(9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980)]; couponing coupled with predatory intent or likelihood of competitive injury, *Armour & Co. v. U.S.*, 402 F.2d 712 (7th Cir. 1968); a conspiracy restricting bids, *Swift & Co. v. U.S.*, 393 F.2d 247 (7th Cir. 1968); discriminatory prices to competing customers, *Swift & Co. v. U.S.*, 317 F.2d 53 (7th Cir. 1963); agreements to allocate purchases of livestock, *Swift & Co. v. U.S.*, 308 F.2d 849 (7th Cir. 1962); discriminatory pricing [activities], *Wilson & Co. v. Benson*, 286 F.2d 891 (7th Cir. 1961).

While these cases do not present compelling precedent for this case, they do indicate that the Congress intended that the Secretary of Agriculture exercise broad authority in the enforcement of Sec. 202(a) of the Act. This, the Secretary has accomplished continuously since at least 1938. Even if the Secretary's efforts are argued to be but burnished diets, they are unequivocal, unreversed and balanced with congressional intent to prevent unfair dealing in the stockyard and meat packing industries. Unfair dealing smacks of fraud which has been defined as follows:

" . . . fraud is unfair dealing; and when through inducements held out by one person, even only by means of a promise, by which another person is influenced to change his position so that he cannot be placed in statu quo, and will be seriously damaged unless the promise is fulfilled, then the refusal to perform is *fraud*. Any transaction that outrages our sense of justice or shocks the conscience of an honest

<sup>25</sup>Sec. 312(a) of the Act.

man may well be viewed with suspicion and scrutinized closely." Emphasis in original, *Tucker v. Owen*, 94 F.2d 49, 52 (4th Cir. 1938).

Meat was purchased by these respondents from suppliers who had been led to believe (TR 45, 56) that they would be paid. These meats have been consumed so there was no opportunity for the suppliers to have achieved a recovery of property the title to which passed upon the expectation of payment by the respondents. The failures of the promises, and payments, constitute fraud as defined above, shock the conscience, were not "... on the square ..." and were violative of Sec. 202(a) of the Act.

The respondents have attempted to exculpate the failure to pay the meat suppliers by attributing the inability to do so, to the foreclosure right exercised by the creditor bank. This argument must be rejected as the Act is considered to be remedial, *Bowman v. Dept. of Agriculture*, 363 F.2d 81, 1966 and the "... administrative action against the respondents is to ... assure financial responsibility within a particular regulated industry." *Samuel M. Rosenthal*, 36 Agric. Dec. 210, 222 (December 1976) (Decision by Judge Campbell). "If a packer does not have adequate finances so that its bank is unwilling to honor its checks in payment for meat or meat products, the packer is responsible for any violations that occur when the bank does not honor its checks." *Rotches Park Packers, Inc.*, 46 Agric. Dec. [573, 584 (1987)] This approach exactly comports with the Department's enforcement of the Perishable Agriculture Commodities Act, which has a similar purpose as that of the Packers and Stockyards Act, i.e. the protection of those who labor for the origination of food supplies. And this protection assures that these suppliers will be promptly paid, regardless of the bankruptcy of the vendee *Veg-Mix Inc. v. Dept. of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987).

### Sanctions

This matter has been subjected to the hearing process and findings of fact have been entered as required by the Act and by the Administrative Procedure Act (5 U.S.C. § 557). These findings have permitted the conclusion that the respondents did indeed violate Sec. 202 of the Act in at least 14 identified instances (Finding 8) and that the individual respondent may be considered the *alter ego* of the corporate respondent.

Accordingly, an order<sup>26</sup> will be entered, not only prohibiting the respondents from pursuing in the future, conduct, which in the past, has been violative of the Act, but also, requiring the payment of civil penalties.

Cease and desist orders are purposeful methods of obtaining future compliance with those statutes and regulations which exist to assure fair dealing in the livestock and meat industries. And, these orders are appropriately entered against both the corporate respondent and the individual respondent. It would be a futile effort to direct an order against the corporation without also assuring that the *alter ego*, Mr. Brust, was not also prohibited from the future violations of the Act. *Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983, 985 (9th Cir., 1971).

The entry of an order requiring the payment of civil penalties is also appropriate, for such would appear to deter violations by these respondents and other entities in the livestock and meat industries and achieve the objectives of the statute.<sup>27</sup> *Butz v. Glover Livestock Commission Co., Inc.*, 411 U.S. 182, 187-8 (1973), 93 S. Ct. 1455, *Rehearing Den'd*, 412 U.S. 933, 93 S. Ct. 2746; *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980) (a reparation order). See also *Brubaker's Freezer Meats v. U.S. Dept. of Agriculture*, 438 F.2d 1332 (8th Cir. 1971).

The Act requires that the amount of civil penalty be determined upon three factors: the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. 7 U.S.C. § 193(b). Testimony relating to these factors was received into the record from Mr. Fred Bridgman, an auditor with the Packers and Stockyards Administration. Mr. Bridgman testified that it was the policy of the agency by which he was employed to consider a failure to pay for meat purchases, the issuance of demand instruments unsupported by sufficient funds and the failure to pay in a timely manner, to be serious violations of the Act. (TR 95) Mr. Bridgman further testified it was his opinion, based upon an examination of tax returns filed on behalf of the corporate and individual respondents, as well as the profit and loss statements of the corporate respondent, that a civil penalty in the amount of \$39,000 should be levied against these respondents. (TR 193-4) Mr. Bridgman also recommended that \$34,000 be held in abeyance to assure compliance with cease and desist orders. Mr. Bridgman, upon [original] examination by respondents' counsel, stated he was not aware of Mr. Brust's financial condition to pay the recommended penalty. (TR 110) Indeed, Mr. Bridgman could not identify the several types of business pursued by Mr. Brust (TR 113), and did not consider Mr. Brust's ability to continue in business. (TR 114) [However, when Mr. Bridgman was recalled at the conclusion of the hearing, he fully considered respondents' ability to pay the requested civil penalty (Tr. 193-95).] Even if Mr. Bridgman's testimony was colored by the Department's more recent enforcement policy relating to the 1976 payment amendment of the Act, 7 U.S.C. § 228b, *Richard N. Garver*, 45 Agric. Dec. 1957, 1959 [(1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109

<sup>27</sup>Again: "He [the Secretary] is given the power to prevent packers, stockyards, . . . from engaging in unfair, unjustly discriminatory or deceptive practices or devices." H.R. Report No. 77, 67th Cong., 1st Session, p. 2. The Secretary's exercise of this power by the entry of appropriate sanctions has been frequently expressed. *Spencer Livestock Commission, Co.*, 46 Agric. Dec. 268 (1967), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

S. Ct. 63 (1988),] the fact remains that the respondents' violations serious.<sup>28</sup>

It was the testimony of Mr. Brust that he had built the sales of meat for the corporation to almost \$10,000,000 annually. (TR 131) Unfortunately, the record supports the conclusion that a substantial portion of this volume was never transferred from "past due accounts payable", to "accounts receivable" on the corporation's books. Finding Number 6 herein reveals that in 1983 twelve suppliers had not been paid for some \$350,000. This is clearly a substantial and serious failure by a substantial business and is worthy of imposition of a substantial penalty.

Even though the Department's auditor possessed scant knowledge concerning the impact of the penalty he proposed, an analysis of certain lead[s] to the conclusion that a large civil penalty would not impair the ability of respondents to continue in the meat distribution business, and that the requirements of proof, *Bosma v. U.S. Dept. of Agriculture*, 754 F.2d 803 (9th Cir. 1984), (rehearing denied 1985), have been met.

The corporate respondent is now a shell and its remaining assets are being liquidated. (TR 152) So, it is no longer an actual or potential entrant in the former business. The individual respondent, who also has experience in a number of other industries, (TR 164-6) would be able to return to the meat distribution industry because he has an ability to pay the entire amount of the recommended penalty. *Holiday Food Services, Inc. v. Dept. of Agriculture*, 754 F.2d 1103, 1106 (9th Cir. 1987). Further, this ability to pay is not linked to the present or future capacity to return to the industry upon which his assets have visited substantial deprecations. Mr. Brust attempted to obtain a release from the corporate respondent. This attempt was not successful as the suppliers have been compelled to sustain the financial failure. However, Mr. Brust, through his liquidating corporation, is known to have retrieved a sum of \$75,000 (TR 153) from the wreck. And, it is these sums which are available to pay the civil penalties assessed herein. While Mr. Brust has no access to the liquidating corporation, all of the capital stock of which is owned by him and children, to extract these sums as the liquidator of the corporate respondent, Mr. Brust's testimony has provided sufficient evidence to permit the conclusion that this liquidating corporation is also but the alter ego of Mr. Brust.<sup>29</sup> This testimony reveals that Mr. Brust had a prior contract with the corporate respondent's prime secured creditor,<sup>30</sup> (TR 164) and, pursuant to that agreement, the bank was to pay 15 percent of a sum received in liquidation to a corporate liquidator employing Mr. Brust. This liquidator, created and controlled by Mr. Brust, which obtains

<sup>28</sup>Mr. Brust appears to be a consultant to persons involved in mergers and acquisitions. (TR 183)

<sup>29</sup>The corporate veil may be pierced to visit the order upon the responsible individual. *Wyck v. Berglund*, 570 F.2d 701, 705 (8th Cir. 1978); *Floyd Stanley White*, 47 Agric. (Jan. 11, 1988) [L. eff'd per curiam, No. 88-3144 (8th Cir. Dec. 15, 1988)]; *Sull Meats, Inc.* Docket No. 6669 Decision by Judge McGrail, May 20, 1988.

<sup>30</sup>First Interstate Bank of Denver.

benefits of recovery and from which Mr. Brust may obtain the funds to pay the penalty levied herein. (TR 151, 154, 177-8, 181) Hence, there is no impediment to the potential re-entry of these respondents into the meat industry imposed by this penalty; the corporate respondent is now a shell; the individual respondent's fiscal competency would be strained, but not destroyed. As a result of the liquidation program, \$75,000 has been collected. The penalty will be ordered to be \$39,000.

### Conclusion

Based upon the evidence of record, the findings herein, the briefs and arguments of counsel, and conclusions herein, it is determined that the allegations of violations of Sec. 202(a) of the Act have been sustained. Accordingly, the following Order is entered.

### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend that Colorado law applies in determining whether the corporate veil should be pierced, and that this case does not meet the piercing criteria under Colorado law (Appeal Petition at 3-6). However, it is well settled that in circumstances such as are involved here, the corporate veil may be pierced in order to make the order applicable to the responsible directing officials and owner, or part owner, of a corporation involved in violations of a federal regulatory statute.<sup>31</sup> State laws are not controlling as to this matter. As stated in *Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983, 984-86 (9th Cir. 1971):

Singleton argues that the doctrine of *alter ego* was improperly applied and that therefore the order should be modified to delete the provisions making it run against him individually. He contends that in the absence of a showing of a fraudulent or inequitable result the corporate entity of Sebastopol should not be disregarded. In so arguing, Singleton relies on California cases which say that fraud or an

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<sup>31</sup>*Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983, 983-86 (9th Cir. 1971); *Brust's Freeter Meats v. USDA*, 438 F.2d 1332, 1342-43 (8th Cir. 1971); *In re Great American Veal, Inc.*, 48 Agric. Dec. \_\_\_, slip op. at 24-25 (Jan. 19, 1989); *In re Johnson-Hollifox, Inc.*, 47 Agric. Dec. \_\_\_, slip op. at 9 (Feb. 22, 1988); *In re White*, 47 Agric. Dec. \_\_\_, slip op. at 125 (Jan. 11, 1988), *aff'd per curiam*, No. 88-3144 (6th Cir. Dec. 15, 1988); *In re Holiday Food Servs., Inc.*, 45 Agric. Dec. 1034 (1986), *remanded*, 820 F.2d 1103 (9th Cir. 1987); *In re Corn State Meats Co.*, 45 Agric. Dec. 995 (1986); *In re Trenton Livestock, Inc.*, 41 Agric. Dec. 1965, 1971-80 (1982); *In re Pasturas, Inc.*, 39 Agric. Dec. 395, 397, 401 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171 (1980); *In re Norwich Veal & Beef, Inc.*, 37 Agric. Dec. 1202, 1205 (1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 566-68 (1977), *aff'd sub nom. Van Wyk v. Berglund*, 570 F.2d 701 (8th Cir. 1978); and see *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir. 1956); *Hedrick v. S. Bonaccorso & Sons, Inc.*, 466 F. Supp. 1025, 1030-31 (E.D. Pa. 1978); *Filippio v. S. Bonaccorso & Sons, Inc.*, 466 F. Supp. 1008, 1015-18 (E.D. Pa. 1978); *In re Roaches Pork Packers, Inc.*, 46 Agric. Dec. 573 (1987); *In re MCM Livestock, Inc.*, 39 Agric. Dec. 893, 900-02 (1980).

inequitable result is required as a predicate for application of the concept of *alter ego*. . . .

We do not think that state law limitations on the *alter ego* theory or doctrine are necessarily controlling in determining the permitted scope of remedial orders under federal regulatory statutes. See generally *Goodman v. F.T.C.*, 9 Cir., 1957, 244 F.2d 584, 590-591. As we there said:

"However, when interpreting a statute the aim of which is to regulate interstate commerce and to control and outroot some civil practices in it, the courts are not concerned with the refinements of common-law definitions, when they endeavor to ascertain the power of any agency to which the Congress has entrusted the regulation of the business activity or the enforcement of standards it has established."

Sebastopol is a creation of the state, and the state courts can undoubtedly define and limit the state's *alter ego* doctrine in applying the state's laws to Sebastopol. The doctrine of *alter ego* is usually invoked in state courts in private litigation, for the purpose of defeating the normal rule of state law that the corporation shields its owners from liability for its obligations. Since the shield was deliberately created by the state to encourage the formation and use of capital, it is not surprising that state courts impose rather stringent limitations upon a doctrine that is designed to remove the shield.

It does not follow that state limitations on the doctrine must be accepted in the application of federal regulatory statutes. In the case before us, the purpose of the cease and desist order is to insure that the regulation will not be thwarted by continued unlawful conduct. It does not impose personal liability upon Singleton for past acts.<sup>32</sup> We think it quite unrealistic to say, in view of the findings that we have quoted, that Sebastopol did the acts charged but that Singleton did not. Everything that Sebastopol did, Singleton did, because Sebastopol, for all practical purposes, was Singleton; he was the substance; Sebastopol was the shadow. The phrase "*alter ego*" is an apt description of the Sebastopol-Singleton relationship. But there is no magic in the phrase; it is the substance that matters. We decline to hold that the Secretary can order only the shadow to cease and desist. To do so would be to reject fact in favor of fiction.

<sup>32</sup>However, a civil penalty or suspension order frequently imposes personal liability on individual for past acts, under the *alter ego* doctrine, as was done in many of the cases cited note 31, viz., *Great American Feed*, *Johnson-Hallifer*, *White*, *Holiday Food*, *Corn State*, *Tren Livestock*, *Pastures*, *Thomason Beef*, *Mid-State*, *Rockes*, and *MCM Livestock*.

The only case authority dealing with the power of the Secretary, under this statute, to issue a cease and desist order against an individual on the basis of acts done by a corporation, is *Bruhn's Freezer Meats of Chicago, Inc., et al. v. United States Dept. of Agriculture*, 8 Cir., 1971, 438 F.2d 1332. That case differs in its facts, but is authority for the power of the Secretary to issue such an order. There are many cases that stand for the general principle that the mere form of a business organization is insufficient to shield the practices sought to be prohibited from the reach of a federal regulatory agency. See, e.g., *Electric Bond & Share Co. v. S.E.C.*, 1938, 303 U.S. 419, 440, 58 S. Ct. 678, 82 L.Ed. 936; *F.T.C. v. Standard Education Society*, 1937, 302 U.S. 112, 119-120, 58 S. Ct. 113, 82 L.Ed. 141; *H.P. Lambert Co. v. Secretary of Treasury*, 1 Cir., 1965, 354 F.2d 819, 822; *Joseph A. Kaplan & Sons, Inc. v. F.T.C., D.C. Cir.*, 1965, 121 U.S. App. D.C. 1, 347 F.2d 785, 787, n. 4; *South Carolina Generating Co. v. F.P.C.*, 4 Cir., 1958, 261 F.2d 915, 920; *Corn Products Refining Co. v. Benson*, 2 Cir., 1956, 232 F.2d 554, 565; *Keystone Mining Co. v. Gray*, 3 Cir., 1941, 120 F.2d 1, 6; *Alabama Power Co. v. McNinch, D.C. Cir.*, 1938, 68 App. D.C. 132, 94 F.2d 601, 618; and our own decisions in *Tractor Training Service v. F.T.C.*, 9 Cir., 1955, 227 F.2d 420, 425; *Goodman v. F.T.C.*, 9 Cir., 1957, 244 F.2d 584, 593-594.

It is true that none of these cases, except *Bruhn's Freezer Meats*, *supra*, deals with the Act that is here applicable. It is also true that it would be possible to distinguish each of them, on its facts, from the facts of this case. Nevertheless, we think that the principle that they announce is applicable here. It is obvious to us that a cease and desist order directed to both Sebastopol and Singleton is far more likely to assure future compliance with the Act than one directed to Sebastopol alone. It is equally obvious that in reality it was Singleton who committed the violations.

Respondents contend that complainant must produce evidence that the challenged conduct is likely to produce injury to competition (Appeal Petition ¶ 6), but there is no such requirement applicable to a practice (such as failure to pay) that is clearly "unfair." Although some cases hold that *certain types* of violations of the Act require proof of predatory intent or proof that the practice is likely to result in injury to competition (e.g., *Annour & Co. v. United States*, 402 F.2d 712, 712-23 (7th Cir. 1968)), other cases recognize that other types of violations require no such proof (e.g., *Bosnia v. USDA*, 754 F.2d 804, 809 (9th Cir. 1984) (failure of auction operator to inform consignors that he was the actual purchaser of their livestock is "inherently unfair," and it may be considered an 'unfair' or 'deceptive' practice absent a more specific showing of actual harm); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1469-70 N.D.N.Y. 1984) (§ 202(a) of the Act prohibiting "unfair" or "deceptive" practices by packers does not require proof of injury to competition; it is sufficient to show that cattle were short weighed); *In re Corn State Meat Co.*, 5 Agric. Dec. 995, 1019-28 (1986); *In re ITT Continental Baking Co.*, 44

Agric. Dec. 748, 781-83 (1985) (remand order), *final order*, 44 Agric. 1971 (1985) (consent order).

As stated in *In re Com State Meat Co.*, 45 Agric. Dec. 995, 1023-28

The Department has consistently taken the position that in order to prove that any practice is "unfair" under §§ 202(a) (7 U.S.C. § 19; or 312(a) (7 U.S.C. § 213(a)) of the Act, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury; and it is the Department's duty to stop unlawful practices in their incipiency prior to actual injury.<sup>13</sup>

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<sup>13</sup>E.g., *In re ITT Continental Baking Co.*, 44 Agric. Dec. (1985), *final order*, 44 Agric. Dec. [1971 (1985)] (consent cease desist order and \$10,000 civil penalty); *In re Walli, Schilling & Co* Agric. Dec. 119, 149-50 (1978); *In re Hines*, 35 Agric. Dec. 113, 12 (1976); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 16 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision); and see *United States v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bonham v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966); *Wilson & Co. v. Benson*, F.2d 891, 895 (7th Cir. 1961); *Hyatt v. United States*, 276 F.2d 308, (10th Cir. 1960); *Daniels v. United States*, 242 F.2d 39, 41-42 (7th Cir. 1957), 354 U.S. 939 (1957); cf. *FTC v. Texaco, Inc.*, 393 U.S. 225-26 (1968); *FTC v. Motion Picture Adv. Co.*, 344 U.S. 392, 39 (1953); and *Corn Prods. Refining Co. v. FTC*, 324 U.S. 726, 738 (1945) (the last three cases involve incipency doctrine under FTC Act).

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A contrary view has been expressed in only a few, atypical cases (four from the Ninth Circuit). In *Armour & Co. v. United States*, F.2d 712, 717-23 (7th Cir. 1968), involving coupon rebates to ultimate consumers on bacon packages, the Seventh Circuit held that evidence must show either predatory intent or that the coupon practice was likely to result in injury to competition to be in violation of § 202(a).

In *Central Coast Meats, Inc. v. USDA*, 541 F.2d 1325, 1327 (9th Cir. 1976) (2-1 decision), in which the Department contended that a packer engaged in an "unfair" practice by being a packer and a dealer, the Ninth Circuit questioned the Secretary's argument that "actual injury need not be shown and that § 202(a) may be used to uproot unfair practices in their incipency." The court held that "the Secretary must show that the conduct in question [packer-dealing] is likely to produce the sort of injury the Act is designed to prevent" (*id.*).

In *Corona Livestock Auction, Inc. v. USDA*, 607 F.2d 811, 814 (9th Cir. 1979), in which the Department contended that a unique method of conducting a livestock sale was "unfair" because livestock buyers



only accept or reject a predetermined price set by the salesman, who rotated the opportunity to accept or reject the price among the potential buyers, the Ninth Circuit repeated that the *Central Coast* case requires the agency to establish that a particular practice is "likely to produce the sort of injury the Act is designed to prevent."

In *DeFong Packing Co. v. USDA*, 618 F.2d 1329, 1336-37 (9th Cir.) (2-1 decision), cert. denied, 449 U.S. 1061 (1980), in affirming the Department's position that a group boycott of a livestock auction market by meat packers was an "unfair" practice, the Ninth Circuit held that the agency must show a "reasonable likelihood" of an undue restraint of competition.<sup>16</sup>

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<sup>16</sup>In *Swift & Co. v. United States*, 317 F.2d 53, 56 (7th Cir. 1963), the Judicial Officer had held that proof of injury to competition, as required by § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, was unnecessary to establish a violation of § 202(a) of the Packers and Stockyards Act. The court, however, did not decide whether that conclusion is correct "since it found that the point is academic" (*id.*).

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The Department does not agree with the decisions in the *Central Coast*, *Corona*, and *Armour* cases,<sup>17</sup> and adheres to its consistent policy set forth above.

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<sup>17</sup>See *In re ITT Continental Baking Co.*, 44 Agric. Dec. [748 (1985)], final order, 44 Agric. Dec. [1971 (1985)] (consent cease and desist order and \$10,000 civil penalty); *Western Iowa Farms Co. v. Sioux City Stock Yards*, 38 Agric. Dec. 1296, 1322 n.12 (1979), *aff'd*, 629 F.2d 502 (8th Cir. 1980) (2-1 decision); *In re Sterling Cola Beef Co.*, 35 Agric. Dec. 1599, 1602 (1976) (ruling on certified questions), final decision, 39 Agric. Dec. 184 (1980), appeal dismissed, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 171-77 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision).

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In *Bosma v. USDA*, 754 F.2d 804, 808 (9th Cir. 1984), the court quoted its *Central Coast Meats, Inc.* holding that the Department must show that the challenged conduct "is likely to produce the sort of injury the Act is designed to prevent." The court found that actual harm

the failure of the auction operator to inform consignors that he was the actual purchaser of their livestock was "inherently unfair" because "the market agent had a fiduciary duty to his consignors," and that such failure "may be considered an 'unfair' or 'deceptive' practice absent a more specific showing of actual harm" (754 F.2d at 809). Hence the Ninth Circuit recognized in *Bosma* that whether a specific showing of actual harm is necessary depends on the type of violation alleged.

Finally, in *Farrow v. USDA*, 760 F.2d 211, 215 (8th Cir. 1985) involving an agreement by two competitors not to compete for certain cows at an auction market, the court held that "actual injury" need not be proven because the "purpose of the Act is to halt unfair trade practices in their incipency, before harm has been suffered." The court said that "the Secretary need only establish the likelihood that an arrangement will result in competitive injury to establish a violation" (*id.* 215).

If the cases requiring proof of a likelihood of injury are to be followed (which we believe is unsound), they should only be followed in the same types of cases in which the holdings were made. Holding in all cases should be confined and limited to the facts under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821). That principle was applied in *Humphrey's Executor v. United States*, 297 U.S. 602, 626-27 (1935), with respect to the decision in *Myers v. United States*, 272 U.S. 52 (1926), in which it is said that the numerous expressions in the *Myers* case beyond the "narrow point actually decided" do not come within the rule of *stare decisis* (295 U.S. at 626). Again the principle was followed in *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 102-04 (1937), with respect to the prior decision in *Taylor v. United States*, 207 U.S. 120, 124-25 (1907).

Many types of practices have been held to be "unfair" under the Packers and Stockyards Act without any proof of predatory intent or likelihood of injury. For example, it is an "unfair" practice for a livestock market agency to engage in business without a bond irrespective of any likelihood of injury. *E.g., In re Hoth*, 36 Agric. Dec. 1812, 1817-19 (1977). In *Hoth*, the livestock market agency contended that there was no need for him to have a bond since he bought livestock only for a large packing agency, which was bonded, and he operated only with the packer's funds and paid for all livestock with checks drawn on the packer. There was no real "likelihood" of injury there, but the market agency's practice of operating without his own bond was, nonetheless, held to be an "unfair" practice.

If proof of a likelihood of injury were required in cases involving the failure of a respondent to have the required bond, all, or almost all, of the bonding violation cases would be dismissed. It would be virtually impossible to predict, in advance, that a particular respondent was likely to go broke owing money for livestock. We know from experience that a number of firms will go broke each year and that without the required bond, there will be injury to livestock sellers. But we do not have a crystal ball to enable us to make a finding of fact that the failure of a particular respondent to have a bond is likely to result in injury.

Similarly, careless or deliberate false weighing is an "unfair" practice under the Act irrespective of any proof of predatory intent or likelihood of injury.<sup>28</sup> Anyone who thinks that the likelihood of injury in a false weighing case is obvious is unaware of the intricacies of false weighing violations. For example, a livestock buying station might increase the price to compensate for the short weight, or regular buyers at a livestock auction market, who would know of the short weights, might increase their bids in consideration of the short weights. All false weighing is routinely held to be an "unfair" practice, without proof as to whether there is a likelihood of injury, and in many cases, it would have been difficult, if not impossible, to prove such a likelihood.

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<sup>28</sup>*In re Muehlenthaler*, 37 Agric. Dec. 313, 321, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Loretz*, 36 Agric. Dec. 1087, 1095 n.5 (1977); *In re Townsend*, 35 Agric. Dec. 1604, 1622 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1819 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1577 n.24 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 526 n.24 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 317 n.24 (1974).

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Similarly, with respect to custodial account violations, the Department has always taken the position that it is an unfair practice for a livestock auction market to fail to properly maintain a Custodial Account for Shippers' Proceeds irrespective of any likelihood of injury.<sup>29</sup> And in custodial account violation cases, the Department has never been required to prove a likelihood of injury.<sup>30</sup> For example, in *Daniels v. United States*, 242 F.2d 39, 40-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957), the court held:

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<sup>29</sup>*In re Powell*, 41 Agric. Dec. 1354, 1361 (1982); *Hyatt and Ward v. United States*, 276 F.2d 308, 309-13 (10th Cir. 1960); *Daniels v. United States*, 242 F.2d 39, 41-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957);

*United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1020-23 (8th Cir. 1932); *In re Roseth*, 39 Agric. Dec. 28, 36 (1980), *aff'd per curiam*, 636 F.2d 1224 (8th Cir. 1980) (unpublished); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 310-11, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Sechrist Sales Co.*, 36 Agric. Dec. 665, 667, 673 (1977); *In re Hardy*, 33 Agric. Dec. 1383, 1398-1406 (1974); *In re Miller*, 33 Agric. Dec. 53, 59-62, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974); *In re Bowman*, 23 Agric. Dec. 1065, 1068-71 (1964); *In re Bowman*, 23 Agric. Dec. 1074, 1086-87 (1964), *aff'd*, 363 F.2d 81, 85-86 (5th Cir. 1966).

\**In re Roseth*, 39 Agric. Dec. 28, 33, *aff'd*, 636 F.2d 1224 (8th Cir. 1980) (unpublished); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 310, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Miller*, 33 Agric. Dec. 53, 62-63, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974); *Bowman v. USDA*, 363 F.2d 81, 84-86 (5th Cir. 1966); *Hyatt and Ward v. United States*, 276 F.2d 308, 310-13 (10th Cir. 1960); *Daniels v. United States*, 242 F.2d 39, 40-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1020-23 (8th Cir. 1932).

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The improper handling and use of the shippers' proceeds is plainly contrary to the Act, 7 U.S.C.A. §§ 205, 208 and 213(u), and of the regulations (9 C.F.R. § 201.40-201.42.) The argument that there is no evidence of any particular shipper not being paid, is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipency. Proof of a particular injury is not required. *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 152, 62 S.Ct. 966, 86 L.Ed. 1336; *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457, 466, 668, 61 S.Ct. 703, 85 L.Ed. 949.

Similarly, in *Bowman v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966), the court held:

And the Act is designed to \* \* \* prevent potential injury by stopping unlawful practices in their incipency. Proof of a particular injury is not required.\* *Daniels v. United States*, 7 Cir., 1957, 242 F.2d 39, 42.

In fact, in most custodial account cases, the Department would be unable to prove a likelihood of injury. Although we know from experience that about 10 to 20 auction markets go broke each year, and that about 3 to 6 of them will not have a bond adequate to cover the total losses, we do not have a crystal ball that would enable us to make a finding of fact that the failure of a particular respondent to maintain his custodial account properly is likely to result in injury.

As stated in Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law* 282 (1981) (footnotes omitted):

The fact that no one suffered from a particular custodial account shortage is no defense, since it is the duty of the Packers and Stockyards agency to prevent potential injury by stopping unlawful practices in their incipiency. However, if the likelihood of injury test as applied in some judicial decisions were applied to custodial account violations, most of the complaints filed alleging custodial account violations would be dismissed. Rarely would it be possible to prove that injury would likely result from a particular custodial account shortage. Usually there would be a reasonable expectation that the time lag between the writing and cashing of the checks would prevent a default. Frequently there would be a line of credit from the bank. Almost always there would be a bond that could be relied on to cover part of any losses.

The most that could be shown is that if all or many of the market agencies selling livestock generally had custodial account shortages, there would be a likelihood that some of them would result in injury. Accordingly, it is the department's position that where there is a custodial account shortage, there is no need to show injury or likelihood of injury in a particular case. No court has required proof of a likelihood of injury in custodial account violation cases.

Accordingly, even if the cases under the Packers and Stockyards Act requiring proof of predatory intent or likelihood of injury were regarded as sound with respect to the types of violations involved in those cases, there are many other types of violations under the Packers and Stockyards Act where predatory intent or likelihood of injury has never been required.

Commercial bribery is, manifestly, unfair, unjustly discriminatory and deceptive, and is violative of § 202(a) of the Act irrespective of proof of injury or likelihood of injury.

Respondents further contend that the record does not support the imposition of the civil penalty assessed under the criteria stated in 7 U.S.C. § 193(b). But that matter was fully considered and correctly decided by the ALJ.

For the foregoing reasons, the following Order should be issued.

#### Order

Central Packing Co., Inc., its successors and assigns, its officers, directors, agents, and employees, directly or through any corporate or other device, and

Albert Brust, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay, and failing to pay when due, for their purchase of meat and meat food products; and
2. Issuing checks in payment for meat and meat food products without having and maintaining sufficient funds on deposit available in the account upon which such checks are drawn to pay such checks when presented.

In accordance with section 203(b) of the Packers and Stockyards U.S.C. § 193(b)), respondents are jointly and severally assessed a civil penalty in the amount of \$39,000 of which \$34,000 shall be held in abeyance for a period of 10 years: *Provided, however,* That if the respondents violate this Order in any manner within this period the full amount of the civil penalty shall immediately become due and payable. Such penalty shall not constitute an agreed settlement for such future violations, should they occur, but shall be in addition to whatever penalties and sanctions such future violations may warrant. If respondents do not violate this order for a 10-year period the remaining \$34,000 shall be abated and shall no longer be due and payable.

The cease and desist provisions of this Order shall become effective against each respondent on the day after service of this Order on such respondent.

The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, 2446-South, United States Department of Agriculture, Washington, D.C. 20250, not later than the 90th day after service of this Order on respondents.

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In re: HUGH T. (TIP) HENNESSEY.

P&S Docket Nos. 6717 and 6851.

Decision and Order filed February 15, 1989.

Inadequate bond - Failure to pay - Willful - Sanction policy.

The Judicial Officer affirmed Judge Baker's order requiring respondent to cease and desist from engaging in business without having an adequate bond (or its equivalent), failing to pay when due, for livestock purchases, and issuing checks in payment for livestock without sufficient funds available in the account. The order suspends respondent as a registrant for 28 days and assesses a civil penalty of \$750. *Willful* defined. Failure to pay when due for livestock, and the use of insufficient funds checks, are violations of the Act. Operating without the required bond is a violation of the Act. Severe sanction policy explained.

Ben E. Bruner, for Complainant.  
Respondent, Pro se.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).<sup>1</sup> An initial Decision and Order was filed on April 26, 1988, by Administrative Law Judge Dorothea A. Baker (ALJ) ordering respondent to cease and desist from engaging in business without having an adequate bond (or its equivalent), failing to pay, when due, for livestock purchases, and issuing checks in payment for livestock without sufficient funds available in the account. The order suspends respondent as a registrant for 28 days and assesses a civil penalty of \$750.

On June 6, 1988, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>2</sup>

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

#### ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION Preliminary Statement

These are disciplinary proceedings under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act by complaints filed on June 11, 1986 (Docket No. 6717), and March 2, 1987 (Docket No. 6851), respectively.

The complaint in Docket No. 6717 alleged that the respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) in that the respondent, in transactions subject to the Act, issued two checks in payment for livestock which were returned because of insufficient funds, and as a result, the respondent failed to pay for livestock, when due, as provided for in the Act.

The complaint in Docket No. 6851 alleges that the respondent willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30), in that the respondent had engaged in the business of a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

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<sup>1</sup>See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1988 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, *Agricultural Law*, ch. 71 (1980).

<sup>2</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450e-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) December 1962-January 1971).

The respondent filed a communication on August 18, 1986, wherein asserted that the amounts alleged as unpaid in the complaint (Docket 6717), had been satisfied. No correspondence of any kind was filed by respondent regarding the second complaint (Docket No. 6851). At the 1 of the oral hearing, there was no outstanding indebtedness on the part respondent, and, he had sufficient bond coverage.

An oral hearing was held July 8, 1987, in Portland, Oregon, before Administrative Law Judge Dorothea A. Baker. Respondent appeared *pro* assisted by Mr. McCullough (Tr. 34). Complainant was represented Ben E. Bruner, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250.

In due course the parties filed briefs, the last brief having been filed November 20, 1987.

### Findings of Fact

1. Hugh T. (Tip) Hennessey, hereinafter referred to as the respondent is an individual whose mailing address is P.O. Box 17626, Portland, Oregon 97217.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to purchase livestock in commerce on a commission basis.

3. Respondent, in connection with his operations subject to the Act, and about the dates and in the transactions set forth below, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because the respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented:

DATE OF PURCHASE	SELLER	AMOUNT
4/17/86	Cattlemen's Livestock Exchange	\$40,416.83
5/01/86	Arthur Spada	22,952.83

4. The \$22,952.83 debt to Arthur Spada incurred by the respondent as a result of livestock transactions, was satisfied in full in July of 1986, over 2-1/2 months after it was incurred (Tr. 18).



5. The \$40,416.83 debt to Cattlemen's Livestock Exchange incurred by the respondent as a result of livestock transactions, was satisfied in full in January 1987, over 7 months after it was incurred (Tr. 18).
5. The respondent received a certified letter from the Packers and Stockyards Administration on September 12, 1986, stating that the surety bond maintained to secure the performance of his livestock obligations under the Act had terminated. Respondent was further notified that if he continued his stock operations under the Act without providing adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations.
7. Notwithstanding the notice given him as set forth in paragraph 6, *supra*, respondent continued to engage in the business of a market agency buying stock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations until several months later when he secured the required bond (Tr. 22-26; Cx 5-9).

### Conclusions

The respondent does not dispute any of the factual allegations contained in either complaint. Regarding the allegations of issuing insufficient funds checks and failing to pay, when due, for livestock, the respondent did not make any denial of the facts alleged. He did indicate in his communication that he had subsequently made payment on those transactions. Complainant stated that both the Spada and Cattlemen's transactions had been satisfied subsequent to the alleged violations. The respondent failed to file any answer or communication regarding the bonding violations alleged in Docket No. 1.

At the oral hearing, respondent only introduced evidence relating to his character and his efforts to mitigate the violations alleged (Tr. 61-67). At no time at the hearing did the respondent ever challenge or deny the jurisdiction of the Packers and Stockyards Administration or the material facts relating to the charges brought against him as alleged in the complaint. The complainant presented clear and convincing evidence through the testimony of its investigator, Steve Wilhoite (Tr. 9-28), and the documents he obtained (Cx 2, 5, 7, 8, 9), that the factual allegations of each complaint were true in all respects.

The respondent has advanced contentions and explanations, which, though true, are beyond the powers of the Administrative Law Judge to consider because of precedential decisions by the U.S. Department of Agriculture's Judicial Officer.

The respondent sets forth on brief, *inter alia*, "... circumstances out of his control prevented his attempts to pay in due course in a prompt manner." These circumstances resulted, "... in a sizable deficiency in his Livestock account." There is no basis, of record, to doubt that Respondent notified the paid parties of his inability to pay on time and obtained an agreement, "... the parties involved and in due course payment, along with adequate interest was made."

The respondent further states that he made all possible attempts to satisfy his bonding obligations, which he ultimately did accomplish.

The definition of willfulness, as interpreted and applied by the Department is represented in the many published decisions. Its application herein does not detract from respondent's integrity, honesty, and ability, nor does it impose evil intent or fraud on his part. The record herein shows respondent has set a good example of hard work and honest dealing.

As the record reveals, at the time of the hearing, the respondent had paid in full those amounts due on the insufficient funds checks, and did have sufficient bond coverage. Complainant's counsel stipulated, "... there is no more outstanding indebtedness on the part of Mr. Hennessey" (Tr. 7). Furthermore, at the time of the oral hearing, respondent had been bonded for quite some time and did have sufficient bond coverage (Tr. 8, 18, 40, 54).

A violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil intent or reliance on erroneous advice, or if the respondent acts with careless disregard of the statutory requirements. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185, 187 (1973); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *In re: Miller*, 33 Agric. Dec. 53 83-87, *aff'd sub nom. Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974); *In re: Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596, 609 (1968). Here, the practices engaged in by the respondent must be characterized as willful. At the very least, the respondent should have known the amount of money in his account on which he issued checks. The issuance of insufficient funds checks is by definition careless disregard for statutory requirements.

On two occasions, respondent issued checks in purported payment for livestock which were returned for "nonsufficient funds" in his account (Cx 2, 3). In the same transactions, respondent failed to give his sellers timely payment for the livestock he purchased (Tr. 18). The failure to pay promptly and in full for livestock and the issuance of "nonsufficient funds" checks have been held to violate sections 312(a) and 409 of the Act. *Lewis v. Butz*, 512 F.2d 681, 682-83 (8th Cir. 1975); *In re: Bryan*, 36 Agric. Dec. 37, 42 (1977); *In re: Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 561-62 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701, 704-05 (8th Cir. 1978); *In re: Trenton Livestock, Inc.*, 41 Agric. Dec. 1965 (1982); *In re: Edwards*, 37 Agric. Dec. 1880, 1887 (1978).

It is clearly a violation of the Act to buy and sell livestock in commerce without maintaining the required bond. *In re: Edwards, supra*, at 1886. The respondent was previously notified that he was required to maintain a bond (Cx 4). It has been held that operating without a bond is a willful violation of section 312(a) of the Act, as such an occurrence is at least "in careless disregard of statutory authority." *In re: Vealey*, 39 Agric. Dec. 8 (1979).

Complainant requests that an order be issued to the effect that respondent be ordered to cease and desist from the practices discussed above; that the respondent be suspended as a registrant for a period of twenty-eight days; and, that the respondent be assessed a civil penalty of \$750.00.

The matters of "sanction policy" and the degree of sanction are not within the province of the Administrative Law Judge. In the absence of compelling reasons otherwise, the Judge follows the Judicial Officer's (Secretary's)

recommended sanctions. His severe sanction policy has been reiterated in the recent case of *Floyd Stanley White*, P&S Docket No. 6472 (Jan. 11, 1988), [*aff'd per curiam*, No. 88-3144 (6th Cir. Dec. 15, 1988),] wherein it was stated, *inter alia*, that the Department has increased substantially the sanction for Packers and Stockyards Act cases in recent years *In re: Spencer Livestock Commission Co.*, 46 Agric. Dec. 268 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), and that:

In determining the sanction, the *USDA Sanction Policy* specifically gives no weight to any hardship caused by the disciplinary order to respondent's community, customers or employees . . . .

\* \* \* \* \*

Respondent's arguments concerning adverse, damaging publicity do not support reductions in the sanction, because such arguments, resulting from agency press releases when a complaint is issued or the case is decided are rejected.

Thus, the Judge feels constrained to adopt the sanction of the complainant and to follow the Judicial Officer's decisions.

It is the policy of the Secretary in disciplinary proceedings under the Packers and Stockyards Act, to impose severe sanctions where serious violations have been shown. *In re: Miller*, 33 Agric. Dec. 53, 71, *aff'd sub nom. Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974). This is both to deter the respondent and to serve as an effective deterrent to others.

It is complainant's belief that only a severe suspension period will serve this purpose. The officials responsible for administering the Act in Oregon and the adjacent states are not able to routinely audit every registrant within their jurisdiction. The agency must rely on sanctions imposed in disciplinary proceedings to help effect voluntary compliance with the Act by respondent and others.

As was stated by the Judicial Officer in *In re: Miller, supra*, at 66: -

The remedial provisions of a regulatory program would be drastically affected if the agency could consider the effects of sanctions only on the respondents and not on others. It is well recognized that persons regulated by a governmental agency keep abreast of administrative proceedings. The actions of potential violators could be significantly affected by the sanctions imposed against other persons . . . .

The record as a whole shows that the respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

The Order requested by the complainant is issued. The Secretary's Judicial Officer has the authority among other things, to lower the suspension period requested by the agency.

## ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICE

Respondent contends on appeal that the sanction is too severe. The sanction imposed here is modest considering the serious nature of respondent's violations. It is the policy of this Department to impose sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth in length in numerous decisions, e.g., *In re Spencer Livestock Commission*, 46 Agric. Dec. 268, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).<sup>3</sup>

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years. *In re Great American Veal, Inc.*, 48 Agric. Dec. \_\_\_\_ (Jan. 19, 1989) (\$50,000 civil penalty for failing to pay for livestock, operating while insolvent and giving undue preference to a creditor, and taking over another packer's inventory without paying the packer's creditors); *In re Tiemann*, 47 Agric. Dec. \_\_\_\_ (Oct. 20, 1988) (5-year suspension for failure to pay \$27,000 for livestock to be terminated after 180 days if full payment made); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. \_\_\_\_ (Aug. 13, 1987) (1-year suspension for custodial account violations and various fraudulent activities); *Parchman*, 46 Agric. Dec. \_\_\_\_ (May 28, 1987) (90-day suspension and civil penalty for weighing violations), *aff'd*, 852 F.2d 858 (6th Cir. 1988); *Rotcher Pork Packers, Inc.*, 46 Agric. Dec. 573 (1987) (\$50,000 civil penalty for failing to pay for meat products); *In re Spencer Livestock Commission*, 46 Agric. Dec. 268 (1987) (10-year suspension and \$30,000 civil penalty for increasing prices and weights in commission purchases), *aff'd*, 841 F.2d \_\_\_\_ (9th Cir. 1988); *In re Welch*, 45 Agric. Dec. 1932 (1986) (decision of the Judicial Officer) (\$10,000 civil penalty and 1-year prohibition from engaging

<sup>3</sup>Severe sanctions issued pursuant to the Department's severe sanction policy were issued, e.g., in *In re Blackfoot Livestock Commission*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d \_\_\_\_ (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-L&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-6 (1986), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 634 F.2d 770 (3d Cir. 1980); *Muehlenhauser*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1979); *Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. B. & S.*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1986), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 36 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. den.*, U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 25, 31-32 (1976), *aff'd*, No. 76-1613 (1st Cir. 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 35 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce*, 35 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. den.*, U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 220, 133, 145-60, *cert. den.*, U.S. 924 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 439-50 (1974), *aff'd per curiam*, 510 F.2d 966 (8th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

business subject to the Act for fraud by an auction market employee); *In re Warner*, 45 Agric. Dec. 1090 (1986) (2-year suspension for failing to pay for livestock), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986) (\$50,000 civil penalty for commercial bribery), *remanded*, 820 F.2d 1103 (9th Cir. 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986) (\$50,000 civil penalty for commercial bribery); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 90 (1986) (6-month suspension for custodial account and check-kiting violations), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (decision as to Millspaugh) 1-year suspension, but permitting respondent to be employed as an auctioneer after 1 year, for check-kiting, custodial account and payment violations, and purchasing livestock for speculation out of consignments); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand) (8-month suspension and \$10,000 civil penalty for fraudulent sales and purchases); *In re T Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final consent decision*, 44 Agric. Dec. 1971 (1985) (\$10,000 civil penalty for discriminatory promotional allowances); *In re Powell*, 46 Agric. Dec. 49 (1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. 1220 (1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984) (\$77,000 civil penalty, with \$27,000 suspended, for payment, bond and trust violations); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year suspension for payment violations), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peteman*, 42 Agric. Dec. 848 (1983) (\$20,000 civil penalty for bait-and-switch advertising and deceptive practices), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

For the foregoing reasons, the following Order should be issued.

### Order

Respondent Hugh T. (Tip) Hennessey, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;
2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented; and
3. Failing to pay, when due, for livestock purchases.

Respondent Hugh T. (Tip) Hennessey is suspended as a registrant for a period of 28 days.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent is hereby assessed a civil penalty in the amount of \$750. The civil

penalty shall be paid by certified check made payable to the Treasurer United States, and mailed to the Assistant General Counsel, Room South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service Order on said respondent.

The cease and desist provisions of this Order shall become effective day after service of this Order. The suspension provisions shall be effective on the 30th day after service of this Order on respondent: *Provided, however,* That if by any means or device whatever, all or part of suspension period is not effectively served during the period indicated, the effective date of the beginning of the suspension period (or the thereof not effectively served) shall be (i) the date fixed by a competent jurisdiction which issues an appropriate order with respect thereto or (ii) upon a showing made by complainant that it is not likely that an order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

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**In re: GENE VANDER VORSTE.**

**P&S Docket No. D-88-34.**

**Supplemental Order filed February 16, 1989.**

Peter V. Train, for Complainant

Jos A. Vogel, Jr., for Respondent.

*Supplemental Order issued by Dorothea A. Baker, Administrative Law Judge.*

On January 12, 1989, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act at such time as he complies fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with such bonding requirements. Accordingly,

It is hereby ordered that the suspension provision of the order of January 12, 1989, is terminated. The order shall remain in full force and effect in all other respects.

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**In re: ASSOCIATED FOOD BROKERS, INC., et al.**

**P&S Docket No. 6518.**

**Dismissal of Remaining Respondents filed February 17, 1989.**

Joey M. Hochberg, for Complainant.

Richard Ben-Veniste, for Respondents.

*Dismissal of Remaining Respondents issued by Victor W. Palmer, Chief Administrative Law Judge.*

For good cause shown, complainant's motion for dismissal is granted and this proceeding is dismissed with prejudice in respect to the remaining respondents, Associated Food Brokers, Inc., and Associated Meats, Inc.

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In re: HIGHMORE LIVESTOCK EXCHANGE.  
P&S Docket No. 6860.  
Decision and Order issued February 27, 1989.

*Failure to maintain bond - Market agency and dealer defined.*

Respondent conducted business as a market agency in the interstate purchase and sale of livestock without the required bond or its equivalent. Distinction between market agency and dealer explained. Making purchases through bonded dealers does not relieve respondent of his obligation to maintain a bond.

Roberta Swartzendruber, for Complainant.

Rick Johnson, for Respondent.

*Decision and Order issued by Paul Kane, Administrative Law Judge.*

This decision is promulgated pursuant to the Administrative Procedure Act, 1966, as amended 5 U.S.C.A. §§ 554, 557 (1977 and Supp. 1988) and the Rules of Practice of the Department of Agriculture governing formal adjudicatory administrative proceedings, 7 C.F.R. §§ 1.130-1.151 (1988).

This is a disciplinary proceeding by which the respondent is charged with a violation of the Packers and Stockyards Act, 1921, as amended, 7 U.S.C.A. § 213(a) (1980 and Supp. 1988), hereinafter referred to as the "Act" and the Department's regulations relating thereto, 9 C.F.R. §§ 201.29-.30, instituted by complaint filed on March 17, 1987, by the Administrator of the Packers and Stockyards Administration, United States Department of Agriculture.

This section of the Act, alleged to have been violated, 7 U.S.C.A. § 213(a) specifies that:

"(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock."

The Act defines those subject to these prohibitions as follows (7 U.S.C.A. § 201):

"(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyards services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agency of the vendor or purchaser."

The Act further expresses these definitions (7 U.S.C.A. § 182):

- “(1) The term “person” includes individuals, partnerships, corporations and associations;
- (2) The term “Secretary” means the Secretary of Agriculture;
- (4) The term “livestock” means cattle, sheep, swine, horses, mules, and goats - whether live or dead;
- (11) The term “commerce” means commerce between any State, Territory, or possession, or the District of Columbia, and any place thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside the same State, Territory, or possession, or the District of Columbia.”

The Act defines transactions in commerce at 7 U.S.C.A. § 183. In view of the content of the defense made in this case, further explanation of the term “commerce” is not necessary.

The Act provides at 7 U.S.C.A. § 213(b) that:

“(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order requiring the person to cease and desist from continuing such violation to the extent that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may assess a civil penalty of not more than \$10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the nature of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for payment of such penalty, or after the affirmance of such penalty, the person against whom such penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by civil action in the appropriate district court of the United States.”

The Secretary is vested with authority to write and enforce bonding regulations by the following (7 U.S.C.A. § 204):

“... the Secretary may require reasonable bonds from every market agency (as defined in this subchapter), ... and every other person operating a market agency (as defined in this chapter), under such rules and regulations as the Secretary may deem necessary.”



suspended or modified or set aside by the Secretary or a court of competent jurisdiction."

And, the Secretary's authority to promulgate general regulations is expressed at 7 U.S.C.A. § 228 which provides that:

"(a) The Secretary may make such rules, regulations and orders as may be necessary to carry out the provisions of this chapter . . . ."

The Secretary has indeed published regulations to effectuate Congress' intent in the enactment of the Act. These regulations include the following, expressed at 9 C.F.R. § 201.29(b):

"(b) Every market agency buying on a commission basis and every dealer buying for his own account or for the accounts of others shall file and maintain a bond. If a registrant operates as both a market agency buying on a commission basis and as a dealer, only one bond to cover both buying operations need be filed. Any person operating as a market agency selling on a commission basis and as a market agency buying on a commission basis or as a dealer shall file and maintain separate bonds to cover his selling and buying operations."

The Administrative Procedure Act, 5 U.S.C.A. § 558 (1977) provides in pertinent part for the imposition of sanctions as follows:

"(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or other order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of wilfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with a requirements.

The allegations of the complaint focus on the alleged activities performed by respondent, a corporation, as a livestock dealer without adequate bond coverage as required by the statute and the regulations which have been promulgated by the Secretary to assure compliance with the statute. It is further alleged that the respondent participated in livestock dealer operations subsequent to receipt by it of notice from the Secretary's officers and employees that activities it was performing were viewed as being in violation of the statute and regulations. The answer, filed on behalf of the respondent on April 20, 1987, admits most of the jurisdictional allegations of the Department's complaint, and thereafter denies all other allegations.

Counsel to the Department have advanced a proposed order which would require that the respondent cease and desist from participating, in any capacity, in any business for which bonding is required under the Act and the regulations without filing and maintaining such a bond or its equivalent. Complaint counsel would further have an order issued by which the respondent would be suspended as a registrant under the Act for at least sixty days and continuing thereafter until full compliance with the dealer bonding requirements have been displayed.

Pursuant to pre-hearing orders issued in this matter, a hearing was conducted on March 15, 1988, in Sioux Falls, South Dakota. The interests of the Department were represented by Roberta Swartzendruber, Esq., Washington, D.C., and the interests of the respondent were represented by Rick Johnson, Esq., of Gregory, South Dakota. At this hearing, exhibits and stipulations were advanced and received into the record and testimony was taken and received from four witnesses. Briefs and proposed findings were filed by counsel on June 10, 1988, July 25, 1988, and November 23, 1988.

Upon consideration of all the matters of record, the following Findings of Fact are made and Conclusions of Law are reached. As a result thereof there is issued the order as requested by complaint counsel.

### Findings of Fact

1. Highmore Livestock Exchange is a South Dakota corporation and is hereinafter occasionally referred to as the respondent. The respondent's principal place of business is located at Highmore, South Dakota, and its mailing address is Highmore, South Dakota 57345. (Complaint and Answer)

2. The respondent is, and at all times relevant herein, was engaged in the business of conducting and operating the Highmore Livestock Exchange, stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard. (Complaint and Answer)

3. The respondent is, and at all times relevant herein, was registered with the Secretary of Agriculture as a market agency to sell livestock on commission basis, (Complaint and Answer; CX 8)<sup>1</sup> and was, prior to July 1986, a registered dealer. (CX 1, p. 3)

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<sup>1</sup>CX refers to the documents offered and received as complaint counsel's exhibits. 'TR' refers to the transcript of hearing conducted before the undersigned on March 15, 1988.

4. The respondent is, and at all times relevant herein, was engaged in the business of a market agency buying and selling livestock in commerce on a commission basis. (CX 2, p. 14)

5. Mr. Nathan Shaull became the sole owner of all of the capital stock of Highmore Livestock Exchange, Inc. on or before July 31, 1987. (CX 8) Prior to that date, Mr. Shaull owned 90 percent of the capital stock of the respondent, and was the manager of the corporate respondent, continuing a family business. (TR 54, 55)

6. On or about May 1, 1986, the respondent was advised by letter from the Regional Supervisor of the Packers and Stockyards Administration, which letter was delivered to the respondent by certified mail and acknowledged by respondent on or about May 5, 1986, that "... unless you have a new bond or equivalent thereof to secure the performance of your livestock obligations under the Packers and Stockyards Act on or before the termination date set forth above, you must discontinue all livestock operations for which bonding is required under the Act. If you continue such operations in commerce after the close of business on May 30, 1986, without filing an adequate bond or bond equivalent you will be in violation of section 312(a) of the Packers and Stockyards Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Such a violation will subject you to disciplinary action under the Act." (CX 4, TR 13) The record reveals that the respondent obtained a bond covering its stockyard operations, but not its dealer functions. (CX 1, CX 8, 9, 10<sup>2</sup>; TR 61, 64, 67)

7. On or about July 9, 1986, the Hub City Livestock Sales, Inc., an auction yard located in Aberdeen, South Dakota issued a group of buyer's invoices to Mr. Nathan Shaull for the purchase of 138 head of livestock in the amount of \$60,845.80. (CX 5, part A, pg. 2) A cashier's check in this amount was issued in payment for these invoices by the Tri-County State Bank of Chamberlain, South Dakota. (TR 48) The payor of this check was the corporate respondent, Highmore. (TR 60) On or about July 10, 1986, the respondent sold 138 cattle for the owner of Hub City Livestock Sales, Inc., Eugene Young, and issued a statement to Mr. Young which reflected the net proceeds to Mr. Young of \$60,845.80. This net amount was obtained by the reductions of specific expenses, included \$538.20 of commissions. (CX 5, pt. A, p. 9) There is no indication from the exhibits offered by counsel or testimony that these transactions were in interstate commerce.

8. On or about September 5, 1986, the Linton Livestock Market, Inc., an auction yard located in Linton, North Dakota issued a buyer's invoice to Larry Vogel for Nathan Shaull of Highmore in the amount of \$31,425.34 for the sale of 64 head of cattle. This amount includes \$129.06 in commission invoiced to the buyer. (CX 5, pt. B, pg. 2) There is in evidence in this matter a bank deposit slip of Linton Livestock Market indicating that Linton had deposited in excess of \$31,000 on September 12, 1988, for this purchase. (CX 5, pt. B, pg. 3 of 3) The testimony indicates that payment of this invoice was accomplished by a check drawn on an account of the respondent. (TR 32)

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<sup>2</sup>Responsible hearsay is admissible in Department of Agriculture proceedings. *Corn State Meat Co., P&S No. 6427, May 8, 1986.*

9. On or about October 10, 1986, Linton Livestock Market, Inc., Linton North Dakota, issued three buyer's invoices to Larry Vogel on behalf of Nathan Shaull totalling \$89,495.03 for the sale of 191 head of cattle. These three transactions included payment by the buyer of commissions of \$127.12, \$128.67 and \$128.96. On or about October 11, 1986, the Linton Livestock Market, Inc. deposited to its custodial account a check in the amount of \$89,495.03 which was paid from an account of the respondent. (CX 5, pt. E, pgs. 3-5<sup>3</sup>; TR 18, 19)

10. On or about October 17, 1986, Linton Livestock Market, Inc. Linton, North Dakota, issued three buyer's invoices to Larry Vogel on behalf of Nathan Shaull totalling \$56,689.87 for the sale of 130 head of cattle. These three transactions included payment by the buyer of commissions of \$122.11, \$70.32 and \$48.05. On or about October 21, 1986, Linton Livestock deposited to its account a check drawn on respondent in the amount of \$56,689.87. (CX 6, pt. C, pgs. 2-6) Testimony indicates that payment of this invoice was by check issued by respondent in the amount of \$56,689.87. (TR 17)

11. On October 12, 1986, a Sunday, the respondent issued invoices on behalf of Nathan [Shaull] to MB Cattle Co. of Sioux City, Iowa, for the sale of 441 head of cattle. These invoices do not reflect any addition to the amounts due from MB Cattle Co. as a commission, nor any reduction to the amounts due to Nathan Shaull as a commission. (CX 6, pgs. 1-2, TR 21) The evidence indicates that \$211,632.66 was included in a wire transfer in payment of these invoices, but no substantial evidence exists to establish the account in which these funds were deposited. The worksheet of MB Cattle Co. accompanying this invoice reflects the payment of \$902.10 as a commission on this transaction. (CX 6, p. 3; TR 20)

12. On October 20, 1986, a Monday, respondent issued an invoice on behalf of Nathan [Shaull] to MB Cattle Co. of Sioux City, Iowa, for the sale of 196 head of cattle. This invoice does not reflect any addition to the amounts due from MB Cattle Co. as a commission, nor any reduction to the amounts due to Nathan Shaull as a commission. (CX 6, pg. 4; TR 21) The record indicates that the amount due on this invoice, \$90,746.21, was included in a wire transfer of funds to respondent's general account #110-920-0. The worksheet of MB Cattle Co. accompanying this invoice reflects the payment of \$386.81 as a commission on this transaction. (CX 6, pg. 5; TR 22)

13. On October 26, 1986, a Sunday, respondent issued its invoice on behalf of Nathan [Shaull] to MB Cattle Co. of Sioux City, Iowa, for the sale of 122 head of cattle. This invoice does not reflect any addition to the amounts due from MB Cattle Co. as a commission nor any reduction to the amounts due to Nathan Shaull as a commission. On or about October 1986, payment on this invoice, \$63,268.09, was included in a wire transfer to respondent's custodial account 110-919-7 at the Tri-County State Bank, Chamberlain, South Dakota. The worksheet of MB Cattle Co. accompanying

<sup>3</sup>Complaint counsel withdrew and did not offer the documents assigned the designation CX 5, part D. However, it appears (CX 5, part E, p. 5) that this transaction related to purchases for which payment was made by Mr. Shaull.

ice reflects the payment of \$260.36 as a commission on this m. (CX 6, pgs. 6-9; TR 22)

The evidence does not sustain a finding that respondent's ons with the Hub City Livestock Sales, Inc. of Aberdeen, South were in interstate commerce. (Finding 9) The evidence does sustain ; that respondent's transactions on September 5, 1986, October 10, d October 17, 1986, with Linton Livestock Market, Inc. of Linton, akota, were in interstate commerce, and that respondent, as the buyer the cattle it purchased from Linton Livestock Market, and that ent, as the buyer paid sales commissions on these purchases. s 8, 9, 10) The evidence does also sustain findings that respondent's ions on October 12, 1986, October 20, 1986, and October 26, 1986, MB Cattle Co., of Sioux City, Iowa, were in interstate commerce, and pondent, as the seller received payment for the cattle it sold to MB Co., and that respondent, as the seller received sales commissions on les. (Findings 11, 12, 13)

The evidence establishes that respondent acted in interstate rce as a market agency buying and selling livestock on a commission ut not as a dealer in the interstate purchase or sale of livestock during ber and October, 1986. (Finding 14)

### Discussion

s corporate respondent is alleged to have violated the Act as expressed .S.C.A. § 213(a). The respondent is also alleged to have violated the ions promulgated at 9 C.F.R. § 201.29-.30<sup>6</sup> The complaint does not e allegations which specifically identify the subsections of the ions purportedly violated by this respondent. Complainant's counsel t clearly advance proof or argument specifically related to allegations ions of the various subsections of the regulations expressed at 9 . § 201.29-.30. However, a finding of the violation of the regulations sed at 9 C.F.R. § 201.29(b) is warranted, based upon the evidence l.

ic allegations and proof here focus upon transactions by which ntial numbers of cattle were bought and sold during July through er 1986. Complaint counsel contends that the respondent corporation fficiently involved in these transactions so as to vest itself with the status bligations of a dealer as defined in the Act. Counsel to the respondent nds that these transactions were but the private dealings of an individual in another capacity, is the principal owner, principal officer and manager e corporate respondent. Thus, this position would have the record ay proof of facts sufficient to activate the *alter ego* theory, thereby

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<sup>6</sup>These allegations merely mimic the language of the Department's form letter used to notify ees of perceived illegal acts or practices, i.e., the so-called warning letter

diverting responsibility for these transactions from the corporate respondent to this individual, Nathan Shaul.<sup>5</sup>

The record displays a series of transactions by which cattle were purchased in 1986.

On or about July 9, 1986, 138 head of cattle were purchased from the Hub City Livestock Sales, Inc. of Aberdeen, South Dakota. These cattle were resold on July 10, 1986, to the owner of Hub City Livestock Sales, Inc. (CX 5, Part A, pp. 1-9) The circumstances of these transactions will not be given further consideration, especially in view of the subsequently discussed evidence, as it appears that the purchase and direct sale thereafter were completed within the borders of the state of South Dakota. The record does not disclose facts as might be sufficient to characterize these purchases and sales as being, in commerce, as defined at 7 U.S.C.A. § 182(11) or, as affecting commerce, as defined at 7 U.S.C.A. § 183.<sup>6</sup>

On or about September 5, 1986, 64 head of cattle, on or about October 10, 1986, 191 head of cattle, and on or about October 17, 1986, 130 head of cattle, were purchased from the Linton Livestock Market, Inc. of Linton, North Dakota. The buyers' invoices for these purchases were issued in the name of an order buyer, Larry Vogel for Nathan Shaul, of Highmore. However, this record establishes that payments for these interstate transactions were made by checks drawn on respondent's bank account and that sales commissions were paid by respondent on these transactions. (Findings 8, 9, 10)

The record also displays a series of three transactions by which cattle were sold in 1986.

Evidence of these transactions was obtained by complainant's counsel from business records maintained by the MB Cattle Co. of Sioux City, Iowa. According to this evidence, MB Cattle Co. was invoiced by respondent, on behalf of Nathan Shaul for the purchase of 441 head of cattle on or about October 12, 1986, 196 head of cattle on or about October 20, 1986, and 122 head of cattle on or about October 26, 1986. Substantial evidence does not identify the account to which payment was made for the transaction of October 12, 1986. (Finding 11) Substantial evidence indicates that payment of the invoices, for the October 20, 1986 transaction, was made to the respondent's general account which was maintained by respondent at the Tri County State Bank, Chamberlain, South Dakota, and that these payments included the payment of a sales commission by the buyer. (Finding 12) Substantial evidence does exist to support the contention of respondent's counsel that the transactions of October 26, 1986, by which cattle were bought and sold, were those of Mr. Shaul. This evidence is found at CX 6, pp. 8-9, which records that MB Cattle Co. directed its check for the payment of this

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<sup>5</sup>There could be some substance to this theory, especially in view of previous Department cases which hold the principal owners, managers and officers liable for the acts of the corporate yard or packer. *Sebastopol Meat Co. v. Secretary of Agriculture* 440 F.2d 983, 984-86 (9th Cir. 1971). However, this theory was not advanced by allegation or proof.

<sup>6</sup>It is not necessary to here plumb the depths of the "current of commerce" theory. *Stafford v. Wallace*, 258 U.S. 493, 515-6 (1922); *Sebastopol Meat Co., Inc.*, 28 Agric. Dec. 435, (1959), aff'd *Sebastopol Meat Co. v. Secretary of Agriculture*, *id.*

chase to the respondent's custodial account, which evidence leads to the conclusion that respondent was, in this instance, acting on behalf of Mr. Mull. (Finding 13)

Nevertheless, the record clearly demonstrates,<sup>7</sup> by evidence from secondary sources, that on three occasions, the respondent paid for the interstate purchase of cattle in September and October of 1986, and, on one occasion, that the respondent received payment to its general account for the interstate sale of cattle in October of 1986. Sales commissions were related to each of these transactions. The record also demonstrates that in 1986, the respondent was a registered market agency conducting business at an auction stand, buying and selling livestock on a commission basis. (Findings 3 and 4) The performance of this function required, by operation of the Department's regulations at 9 C.F.R. § 201.29(b), that respondent post and maintain separate surety bonds covering the buying and selling operations. The record indicates that such a bond was not in place during September and October 1986. (Finding 6)

The allegations of the complaint would establish that the respondent acted as an un-bonded dealer during 1986. However, the facts lead to the conclusion that the respondent was not a dealer, because it paid and received sales commissions on the transactions on which complaint counsel offered proof.

The Eighth Circuit Court of Appeals, the Circuit Court with jurisdiction over the area within which respondent conducted its business, has addressed the classification of the activities pursued by a corporation engaged in the purchase and sale of livestock. And, the basic element of the classification used to determine a person's status as a market agency, or as a dealer, pursuant to the Act at 301(c)(d), (7 U.S.C.A. 201 (c)(d)), was the claim, charge or allowance for a commission on the particular purchase transactions. The Court examined these and perceived that the payment of, or receipt of, a commission, was absent and hence determined that the person acted as a dealer, rather than as a market agency. *General Insurance Co. of America v. Hannell Livestock Market, Inc.*, 353 F.2d 67, 70-71 (8th Cir. 1965)

The basic element upon which the *General Insurance, Id.* case turned was so the determining factor in the landmark decision on this issue before the Secretary of Agriculture. In *Sterling Colorado Beef Co.*, P&S No. 5201, 39 Agric. Dec. 184 (1980), appeal dismissed No. 80-1293 (10th Cir. 1980), the Judicial Officer wrote at 214:

"Under the Act, a person who is engaged in the business of buying or selling livestock for others is either a market agency or a dealer - a market agency if he charges a commission; a dealer if he does not."

<sup>7</sup>The record lacks the documentary evidence which complaint counsel could have sought from respondent, by requests for the issuance of process, and which respondent's counsel could have requested of Highmore Livestock Exchange.

This was also a prime facet of *C. J. Edzards*, P&S No. 5428, 37 Agric. D 1880, 1886 (1978) and *Tommy J. Hines and Bobby T. Tindel*, P&S No. 4 35 Agric. Dec. 113, 117 (1976).

Ordinarily, in adjudicative proceedings, proof must sustain the allegations. A failure to prove could result in the dismissal of allegations jeopardize the entire case. Here, complaint counsel's proof does not sustain the allegation that respondent acted as a dealer. Instead, the proof discloses that respondent acted as a market agency, buying and selling livestock, as by the payment and receipt of sales commissions, in essentially contemporaneous transactions. The proof further establishes that such activity was protected by only a seller's bond (Finding 3) and not by a buyer's bond.

Thus, the Department's complaint alleges that the respondent acted as a dealer at the same time it was doing business as a market agency engaged in the sale of livestock. The proof of complainant counsel establishes that sales commissions were paid and received in the cited transactions. Therefore, respondent is classified as a market agency engaged in both the sale and purchase of livestock.

This status requires, according to the Department's regulations, separate bonds be posted covering these separate functions. The proof establishes that such did not exist and it is therefore appropriate to find existence of a violation of 9 C.F.R. § 201.29(b) and to enter the appropriate remedial order.

The non-conformity of proof to the allegations does not here prevent finding of a violation. The complaint alleges violations of the Act and regulations at 9 C.F.R. § 201.29-30, allegations which encompass that failure to exist, 9 C.F.R. § 201.29(b). The complaint thus apprised the respondent of the general character of the allegations which it faced. The intended purpose of those allegations was to be made available to the respondent, pursuant to the pre-hearing order, at least 15 days prior to the commencement of the hearing. The proof was introduced, offered and subjected to cross-examination. Respondent had every opportunity to introduce contradictory and explanatory material. The respondent has had a full opportunity to know the basis of the complaint against it and has a full opportunity to meet the issues. *Nathaniel Labor Relations Board v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, (1938); *Garber v. Civil Aeronautics Board*, 276 F.2d 321, 323 (2nd Cir. 1959). Due process has not been compromised.

The respondent has contended that the livestock it purchased were purchased by Nathan Shaul for maturation and "backgrounding." (TR 54, 55, 56, 61, 63) However, the preponderance of evidence indicates that these cattle were in fact the property of the corporate respondent. (CX 5-10) However, respondent argued non-application of the Act to these transactions as being but a sign



of the prime business of raising livestock, is not supported by fact<sup>8</sup>, nor indeed, did the Act ever grant such an exemption.<sup>9</sup>

The respondent also contends that no useful purpose would be served by requiring a bond covering his livestock purchases, because all such purchases were made by respondent only through bonded dealers. This argument has been previously rejected as the additional bond coverage provides additional protection. *John E. Hoth*, 36 Agric. Dec. 1812, 1819 (1977).

The Administrative Procedure Act and the Department's regulations at 7 C.F.R. § 1.134(b)(2) require that the suspension sought by complaint counsel would be lawfully imposed only if, prior to the institution of proceedings, the Department had provided written notice to the respondent that its conduct was perceived to be contrary to the Act, and had given the respondent an opportunity to achieve compliance with the Act and regulations. The evidence demonstrates that the Department did address such a warning letter to the respondent, and that the respondent's principal owner did in fact receive such a letter. (Finding 6) The Department's letter is dated May 1, 1986; it was received on May 5, 1986. The Department's complaint was issued on March 17, 1987. The respondent had ten months within which it could have posted the bond demanded by the Department's letter of May 1, 1986.

In these circumstances, it is not necessary to address the so-called willfulness issue which could have arisen absent the warning letter of May 1, 1986. *Parchman v. U.S. Dep't of Agriculture*, 852 F.2d 858, 865 (6th Cir. 1988), affirming *Robert E. Parchman*, P&S No. 6602, slip opinion at 64 (May 28, 1987), *Murfreesboro Livestock Market, Inc.*, P&S No. 6646, slip opinion at 19-20 (August 13, 1987), *Gerald F. Upton*, 44 Agric. Dec. 1936, 1943 (1985). Therefore, the facts of this record, (Finding 6) display a compliance with the Administrative Procedure Act, *id.*, and, thus, appropriate sanctions may, and will be, imposed.

The failure to obtain the required bond is an unfair and deceptive practice under 7 U.S.C.A. § 213(a), *U.S. v. Hulings*, 484 F. Supp. 562, 566-567 (D.C. Kansas 1980), *Harry Vealey, Jr.*, 39 Agric. Dec. 8, 11 (1979); and the failure to obtain the bond required under the Act (7 U.S.C.A. § 204) and regulations constitutes an unfair and deceptive practice in violation of the Act; *Mild West Veal Distributors*, P&S 5735, 43 Agric. Dec. 1124, 1139 (1984). A single violation may be an unfair practice under the Act, *Leon Farrow, et al.*, P&S 5893, 42 Agric. Dec. 1397, 1429 (1983), *aff'd in part*, *Farrow v. U.S. Dep't of Agriculture*, 760 F.2d 211 (8th Cir. 1985). See also *DeQuoin Packing Co.*, P&S 5921, 41 Agric. Dec. 1367, 1381 (1982). The importance of bonding requirements have been highlighted in the following recent cases: *Edward Tiemann*, P&S 6780 (October 20, 1988); *Mike Robertson*, P&S 6945 (May 27,

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<sup>8</sup>The respondent's petition for re-instatement of its corporate charter as filed in September 1984 revealed that the purpose of the corporation was "selling livestock at public auction." (CX 2, p. 14)

<sup>9</sup>While the Senate had written legislation which would have inserted this exception (61 Cong. Rec. 2,704, 2,707, June 17, 1921), it was not present in the final Act (H.Rep. No. 324, 67th Cong. 1st Sess. p.7).

1988); *Mark V. Porter*, P&S 6538 (April 28, 1988); *Robert F. Johnson*, P&S 6677 (February 27, 1988); *Charley Chanton*, P&S 6782 (July 13, 1987). See also *Molnar Packing Co.*, 41 Agric. Dec. 935 (1982).

The brief of respondent's counsel reveals that the respondent is now out of business and hence suggests that the entry of an order would be but a futile act. Such a conclusion would be inappropriate, for the respondent could, at a future point, resume business activities.<sup>10</sup> *A.W. Schmidt & Son, Inc.*, P&S 6791, 46 Agric. Dec. 586 (1987); *Norwich Veal and Beef, Inc.*, 38 Agric. Dec. 214 (1979); *Raskin Packing Co.*, 37 Agric. Dec. 1890 (1978).

### Conclusion

The respondent is found to have conducted business as a market agency in the interstate purchase and sale of livestock during 1986 without having obtained the required bond or equivalent thereof, and is thus found to have violated the Act (7 U.S.C.A. § 213(a)) and the regulations (9 C.F.R. § 201.29(b)).<sup>11</sup> Therefore, the following Order is entered:

### Order

Respondent Highmore Livestock Exchange, its officers, directors, agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act for a period of sixty (60) days and thereafter until it demonstrates it is in full compliance with the bonding requirements under the Act and regulations. When the respondent demonstrates that it is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

<sup>10</sup>Counsel to respondent contends that the Department's compliance should have been directed to respondent's principal officer and owner, Mr. Shaul, or that the corporate veil be pierced, *Farmers Feed & Seed, Inc. v. Magnus Enterprises, Inc.*, 344 N.W. 2d 699 (S.D. 1984) with the result that any disciplinary order would be imposed on Mr. Shaul rather than respondent. These arguments are not convincing in view of the facts discussed herein.

<sup>11</sup>As a seminal case, *U.S. v. Donahue Bros., Inc.*, 59 F.2d 1019 (8th Cir. 1932), advanced the principal that the Secretary's Regulations, issued pursuant to the Packers and Stockyard Act are interpretative, advisory rules. Recognition of this principal has continued. *Farrow v. U.S. Dep't of Agriculture*, 760 F.2d 211 (8th Cir. 1985). However, these cases do not involve the mandatory character of 7 U.S.C.A. § 204, which here requires the Secretary to establish "... reasonable bonds ... under such rules and regulations as he may prescribe ...". Additionally, the department's Judicial Officer has retained the authority to assess the legislative character of the regulations on a case-by-case basis, *Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 135-36 (1978) and has recently levied a civil penalty in the amount of \$4,000 upon a failure by a yard operator and dealer to maintain an adequate bond as required by the regulations. *Robert F. Johnson*, 41 Agric. Dec. \_\_\_ (February 29, 1988).

The provisions of this Order shall become effective 35 days after service of this Order upon respondent unless appealed by a party hereto within 30 days after service upon respondent (7 C.F.R. § 1.145(a)). Copies of this Decision shall be served upon the parties.

[This Decision and Order became final April 15, 1989.—Editor]

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1 re: JEFFREY C. FERGUSON.

&S Docket No. 6826.

Decision and Order filed March 1, 1989.

Judicial Officer affirmed Administrative Law Judge—Administrative Law Judge findings of fact given great weight but can be overruled—Definition of market agency—Willful defined—Sanction policy explained.

The Judicial Officer affirmed Chief Judge Palmer's order requiring respondent to cease and desist from various practices relating to his billing and collecting payment from principals (for whom he bought livestock on a commission basis) on the basis of falsely increased prices or expenses. The order requires respondent to keep full and accurate accounts and records, suspends his registration for 6 months, and assesses civil penalties (held in abeyance for 5 years in condition that the cease and desist order is not violated) totaling \$25,000. However, the Judicial Officer made the civil penalty, if effectuated, payable over 5 years. Findings of fact by ALJs are given great weight by the Judicial Officer, but can be overruled in appropriate circumstances (which do not appear here). A person charging a commission in a livestock transaction subject to the Act is, by statutory definition, a market agency. Itemization of a commission, on each of the invoices involved in this case that respondent sent to customers, shows that respondent was acting as a market agency. The fact that respondent's invoices do not show a true price per hundredweight (but, rather, show only the average cost of the livestock) shows that respondent was acting as a market agency. The fact that some of respondent's invoices show the price in "odd" amounts, e.g., \$57.97 per hundredweight, is strong evidence of a market agency arrangement. Willful defined. Complainant need not prove that respondent knew of the regulatory requirements, to prove willfulness. Violations of a fiduciary duty are particularly serious. Severe sanction policy explained. The sanction is the same irrespective of whether violations are intentional. The fact that customers were generally satisfied is irrelevant in determining the sanction.

Allan R. Kahan, for Complainant.

Gerard D. Eftink, for Respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).<sup>1</sup> An initial Decision and Order was filed on April 25, 1988, by Chief Administrative Law Judge Victor W. Palmer (ALJ) ordering respondent to cease and desist from various practices relating to his billing and collecting payment from principals (for whom he bought livestock on a commission basis) on the basis of falsely increased prices or expenses. The order requires respondent to keep full and accurate accounts and records, suspends his registration for 6 months, and

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<sup>1</sup>See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 5 (1981 and 1988 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Hart, *Agricultural Law*, ch. 71 (1980).

assesses civil penalties (held in abeyance for 5 years on condition that it cease and desist order is not violated) totaling \$25,000. The ALJ denied petition for reconsideration of the sanction on May 18, 1988.

On June 17, 1988, respondent appealed to the Judicial Officer, to who final administrative authority has been delegated to decide the Department cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>2</sup>

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case with a few changes that are trivial, except that the civil penalty, if effectuate is made payable over 5 years. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

### ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. §§ 181-229; hereinafter the "Act"), instituted by a complaint filed by the Administrator of the Packers and Stockyards Administration, United States Department of Agriculture. The complaint alleges that respondent, a registered dealer under the Act, violated the Act by representing to various customers that he was purchasing livestock for them on a commission basis when, in addition to the agreed buying commission, he invoiced, billed and collected from them on the basis of price that exceeded the actual purchase prices. Respondent's answer denied each and every allegation of the complaint.

An oral hearing was held before me on October 21-22, 1987, in Sioux City, Iowa. Complainant was represented by Allan R. Kahan, Esquire, Office of the General Counsel, United States Department of Agriculture. Respondent was represented by Gerard D. Eftink, Esquire, Van Hooser, Olsen, Parkinson, P.C., Kansas City, Missouri. Briefing was completed on January 29, 1988.

For the reasons specified in the findings and conclusions that follow, an order is being entered finding that respondent violated the Act and ordering him to cease and desist from violating the Act now and in the future, suspending him as a registrant for six months, and assessing a civil penalty against him of \$25,000 to be held in abeyance provided he commits no other violations during the next five years.

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<sup>2</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1949 (U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprints in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed January 1971, having been involved with the Department's regulatory programs since 1935 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

# Findings of Fact

1. Respondent, Jeffrey C. Ferguson, is an individual doing business as Ferguson Cattle Co., Highway 9 and 71, Spirit Lake, Iowa 51360. He was born on April 28, 1955.

2. Respondent is and at all times material herein was registered with the Secretary of Agriculture as a dealer buying and selling livestock for his own account or as the agent of purchasers.

3. Respondent, on or about the dates and in the transactions set forth below, purchased livestock for various customers on a commission basis and led them to believe that his invoices to them consisted of the actual purchase prices plus the agreed buying commissions when, in fact, the prices shown were substantially higher than the actual purchase prices. Respondent billed and collected from his customers in these transactions on the basis of the increased prices shown on the invoices plus the agreed commissions rather than at the actual purchase prices plus the agreed commissions. Respondent thereby collected amounts over and above the agreed commissions in each of the following transactions:

Purchase Date in 1985	Customer	No. of Head	Actual Purchase Price	Increased Invoice Price	Amount of Increase
2/8	Feldick Cattle Co. Buffalo Center, IA	224	\$106,692.86	\$109,029.20	\$2,336.34
2/14	John Elser Lake Park, IA	77	30,872.54	31,382.84	510.30
3/13	Harold Christenson Royal, IA	9	2,749.38	3,411.88	662.50
4/25	Hummel Farm Spirit Lake, IA	69	26,487.33	26,885.25	397.92
5/6	Paul Harrington* Woden, IA	83	29,966.40	30,492.35	525.95
5/9	Larry Graham Aurelia, IA	69	31,842.27	32,623.99	781.72
		60	26,974.94	27,422.49	447.54
5/17	Larry Graham	35	16,790.09	17,045.47	255.38
5/20	John Elser	72	30,473.98	30,519.58	45.60

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\*Paul Harrington was a college classmate of Jeffrey C. Ferguson.

Purchase Date in 1985	Customer	No. of Head	Actual Purchase Price	Increased Invoice Price	Amount of Increase
5/23	Gary Hendrickson	28pr.	14,257.50	14,672.00	414.50
10/3	Floyd Swanson Aurelia, IA	131	55,598.04	56,567.27	969.23
10/8	Floyd Lux Cherokee, IA	61	27,782.48	28,465.38	682.90
10/17	Floyd Swanson	118 58	50,410.41 29,076.84	52,108.95 29,331.90	1,698.54 255.06
10/20	Dennis Rupp Quimby, IA	59 44	20,456.70 11,636.80	20,921.62 11,948.50	464.92 311.70
10/21	Phil Timmons Mcvin, IA	92	33,817.65	34,075.80	258.15
10/21	Jack Montgomery Larrabee, IA	99	28,835.03	29,874.12	1,039.09
11/13	Ronald Johanson Swca City, IA	250	97,078.08	98,174.23	1,096.15
11/23	LeRoy Peterson Comfrey, Minn	56	27,251.40	27,994.62	<u>743.22</u>
					[Total \$13,896.71]

4. Seven of the respondent's fifteen customers in the transactions specified in Finding No. 3 *supra*, were called as witnesses by complainant; none of the others were called by respondent. The customers testified:

(a) The transactions were presented to them as agency transactions in which respondent's only profit was to be the agreed commission.

(b) Respondent did not advise any of them that he had taken title to the cattle they were to buy and that he had paid a lesser price than the price shown on his invoice on which they were billed and required to pay.

(c) In other transactions some of the customers had with him, respondent did bill them as a dealer at a flat price. But the transactions specified in finding No. 3, *supra*, were presented as the type where respondent's only profit was to be the agreed commission

shown as an add-on to the invoiced prices which were understood to be the prices he had actually paid for the cattle.

(d) Respondent never informed these customers that he was taking his profit on a basis other than the commissions charged, and as Floyd Swanson testified:

"... when you spend them kind of dollars (over \$100,000), you should know the whole story." (Transcript 170)

5. Respondent also billed and collected from his customers for health inspection fees which in respect to [three] of the transactions set forth in Finding No. 3, *supra*, were in amounts that exceeded the charges incurred and, in respect to five others, his business records do not show that such charges were incurred.

6. Respondent's tax returns and his reports to the Packers and Stockyards Administration show that though he has sustained various business losses both as a livestock dealer and as an operator of other businesses, he has purchased four to ten million dollars worth of livestock annually, on which his annual earnings as sole owner of Ferguson Cattle Co., vary: he lost money in 1982; he earned \$61,524 in 1983; he earned \$51,151 in 1984; he earned \$19,245 in 1985; and he earned \$22,158 in 1986.

### Conclusions

Respondent engaged in unfair and deceptive practices when he invoiced, billed and collected from customers for cattle on the basis of agreed commissions without disclosing that in addition to the agreed commissions, he profited from the prices shown on his invoices because they were higher than the actual purchase prices. Respondent thereby unfairly and deceptively led his customers to believe that his only profits would be the agreed commissions when, in fact, he also took profits through unrevealed increases he added to the actual purchase prices. Respondent also deceived his customers and engaged in an unfair practice by charging more for health inspection charges than those actually incurred.

Respondent's violations were wilful in nature and complainant, for this reason, was not required by 5 U.S.C. § 558(c), to give respondent a written warning and an opportunity to comply with the Act, before seeking his suspension as a registrant.

The defense offered by respondent that he paid the deducted commissions to others who helped him secure suitable cattle, is insufficiently supported by the evidence of record; and, even if there were sufficient evidentiary support for

The order should additionally suspend respondent as a registrant under the Act for his violations of the Act, for a reasonable specified period determined to be six months.

The order should also assess a civil penalty of \$25,000 for respondent's violations with all of the penalty held in abeyance provided he commits no other violations during the next five years. In determining the amount of the civil penalty to be assessed I have considered the gravity of the offense, the size of the business involved, and the effect of the penalty on respondent's ability to continue in business.

#### Discussion

The Act provides (7 U.S.C. § 213):

"(a) It shall be unlawful for any . . . market agency, or dealer, to engage in or use any unfair . . . or deceptive practice or device in connection with . . . the . . . [buying, or] selling on a commission basis or otherwise . . . of livestock."

Respondent is registered as a dealer and often dealt with his customers on a commission basis; selling them cattle at a flat price. However, in the transactions set forth in Finding 3, *supra*, respondent undertook to supply his customers with cattle for which he charged a commission. By statutory definition he became a "market agency". See 7 U.S.C. 201(c) and (d). His customers assumed and had a right to assume, that as to these transactions, respondent was a market agency and they became entitled to the protections a market agency must afford its customers, namely:

#### 7 C.F.R. § 201.44

Each market agency shall, promptly following the purchase of livestock on a commission or agency basis, transmit or deliver to the person for whose account such purchase was made or the authorized agent, a true written account of the purchase showing the number, weight and price of each kind of animal purchased, the names of the persons from whom purchased, the date of purchase, the commission and other lawful charges, and such other facts as may be necessary to complete the account and show the true nature of the transaction."

Respondent's conduct subjected him to these requirements which a market agency must observe as its customers' fiduciary. See, *Tommy J. Hine*, 35 Agric. Dec. 113 at 117-18 (1976); *Hoth*, 36 Agric. Dec. 1812, 1818 (1977); *Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 214-15 [(1980), dismissed, No. 80-1293 (10th Cir. Aug. 11, 1980)].

Respondent's defense, that he was really a dealer, is no defense. Even if respondent's conduct was not considered to be a violation of his fiduciary duty a market agency owes a client, it is a violation of the Act.



dealer to employ an unfair or deceptive practice when selling livestock. Respondent's customers were being charged commissions in addition to the profit respondent took by increasing his prices over those he had paid. The use of the term "commission" in these circumstances was deceptive and unfair. The transactions were made to appear to be something other than arm's length sales. Respondent's practices in these circumstances would be unfair and deceptive even if he could be construed to have been acting as just a dealer and not a market agency.

As pointed out by complainant, respondent did know how to properly prepare invoices in dealer transactions as demonstrated by other sales of cattle he made at a flat price. His conduct, therefore, cannot be said to have been inadvertent and must be construed as a willful violation of the Act. See, *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1972); and *J. A. Speight*, 33 Agric. Dec. 280, 302 (1974). For this reason, the "second chance" requirement of 5 U.S.C. § 558(c), that a warning letter be sent before a license may be suspended, is inapplicable.

Even under *Farrow v. USDA*, 760 F.2d 211, 211-16 (8th Cir. 1985), respondent's conduct must be construed as "intentional, flagrant and serious" and a suspension order may properly be imposed under this criterion by the 8th Circuit, which the Judicial Officer has rejected as unduly restrictive. See, *Spencer*, [47 Agric. Dec. 268, 460 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)].

Respondent has attempted to justify his invoicing practices by asserting that he paid the commissions charged to others who helped him secure the kind of cattle his customers wished to buy. However, he admitted that his payment of these commissions was not made at the time of each transaction; he computed and paid them subsequently on a catch-as-catch can basis. He offered no proof that the commissions charged his customers in the transactions specified in finding number 3 *supra*, were in fact passed on to others. Moreover, even if there was sufficient evidence to show that each commission was actually passed on to another person, the practice was contrary to the information respondent gave his customers. He never explained to any of them that he was taking his profit by increasing the prices on the invoice over those he actually had paid, and that the commission was not his fee but an expense incurred.

In every sense, respondent's practices were unfair and deceptive and warrant the imposition of a cease and desist order, respondent's suspension as a registrant and the assessment of a civil penalty. Mr. Ferguson even deceived a college classmate. To enhance his profits, he went so far as to charge more for health inspection fees than he had paid. His actions resulted in my opinion; not from youthful inexperience as his attorney contends, but from his deliberate and calculating effort to obtain every business advantage.

Complainant has recommended that respondent's license be suspended for six months and that a \$25,000 civil penalty [be] assessed but held in abeyance to better deter future violations by respondent. Six months would normally appear to be a lengthy suspension but according to respondent's tax returns, he has never earned more than \$5,000 a month from his business and the suspension would therefore cost him at most \$30,000.

Respondent has been shown to have surreptitiously increased his profit by \$14,000 (the total of the purchase price differences set forth in Findings *supra*), and it is fair and just to suspend him as a registrant for a period of time that shall have a monetary impact at least double the amount of fraudulent gain. His ability to stay in business may be affected by this suspension, but that is as it should be for this type of offense involving fraud to customers to whom a fiduciary duty was owed. Moreover, as complainant points out, this factor which must be considered when imposing a civil penalty does not have application when the operative sanction under the Act is a registrant's suspension.

A \$25,000 penalty is similarly appropriate when the gravity of the offense and the size of respondent's five to ten million dollar a year business are considered, and those factors outweigh concerns respecting his ability to stay in business. However, inasmuch as the civil penalty is being held in abeyance, it will not presently affect respondent's ability to stay in business.

Accordingly, the following order is being entered.

#### ADMINISTRATIVE LAW JUDGE'S RULING ON MOTION TO RECONSIDER

Respondent has requested reconsideration of the sanctions I imposed against him, whereby he will be suspended for six months, and will be assessed a civil penalty of \$25,000 that shall be held in abeyance for five years provided respondent does not violate the provisions of a cease and desist order during that time.

Respondent requests that I amend the Order to similarly hold the six-month suspension in abeyance for five years, and reduce the amount of civil penalty to \$5,000.

Each of the matters respondent has asked me to now take into consideration, I previously considered. I considered his age and experience; I considered the nature and amount of the economic losses he was seeking to overcome. I considered the effect of each sanction I imposed on his ability to stay in business.

At the time of the violations, respondent was nearly thirty years old; he was a dewy-eyed youth. In fact, he impressed me as a sharp, calculating businessman; well able to understand his actions and their consequences.

The business losses he incurred two years before when he was twenty-seven, were not caused by any of the people against whom he later charged hidden, add-ons to agreed commissions in order to maximize his profit.

He may not be able to survive a six-month suspension, but it is my sanction that the officials who administer the Packers and Stockyard Act believe is needed to deter respondent and other industry members who face equivalent temptations, from committing future violations. It is a consequence that is consistent with the legislative history of the Act cited by respondent. It is a consequence that does not conflict with the plain meaning of the Act which does not prohibit a suspension if it is believed to be necessary even when a registrant's ability to stay in business is affected. Moreover, to place the period of suspension in abeyance would render the order ineffectual.

which seeks to modify the business conduct of a man who even deceived a college classmate to increase his personal profits. There must be an actual sanction imposed in these circumstances. There are times when we may feel sympathy for someone who has been a victim of circumstance, or whose violation of law or regulation is more technical than real. But this is not one of them.

There also must be the threat of severe future punishment if respondent is to be deterred from sharp conduct after his suspension as a registrant ends. For that reason, it is not appropriate to reduce the \$25,000 civil penalty to \$5,000, that shall be held in abeyance for five years provided respondent complies with the order's cease and desist provisions.

Upon reconsideration of the order entered on April 25, 1988, all of its provisions shall stand as therein specified.

#### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

##### I. The ALJ's Findings, Based in Part on His Negative Evaluation of Respondent's Credibility as a Witness, Are Amply Supported by the Record.

Respondent contends that the evidence does not adequately support the ALJ's findings of fact, but there is much more than a preponderance of the evidence, which is all that is required.<sup>3</sup> Furthermore, the ALJ's findings and conclusions are based, in part, on his evaluation of respondent's credibility as a witness. In short, the ALJ did not believe respondent's testimony. The ALJ stated (Initial Decision at 10; Reconsideration at 2):

In every sense, respondent's practices were unfair and deceptive and warrant the imposition of a cease and desist order, respondent's suspension as a registrant and the assessment of a civil penalty. Mr. Ferguson even deceived a college classmate. To enhance his profits, he went so far as to charge more for health inspection fees than he had paid. His actions resulted in my opinion; not from youthful inexperience as his attorney contends, but from his deliberate and calculating effort to obtain every business advantage.

....

There are times when we may feel sympathy for someone who has been a victim of circumstance, or whose violation of law or regulation is more technical than real. But this is not one of them.

<sup>3</sup>See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Stenderson v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd* 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

I agree with the ALJ's evaluation of the credibility of the witness. Findings of fact by ALJs are consistently given great weight by the Judicial Officer. As stated in *In re Spencer Livestock Commission Co.* (attached Appendix A), 46 Agric. Dec. 268, 407-09 (1987) (Appendix A at 176-78), 841 F.2d 1451 (9th Cir. 1988):

The superior advantages of the ALJ, who saw and heard the witnesses testify, for determining their credibility, including determining the expertise and credibility of expert witnesses, is well recognized. As stated in *Great Western Food Distributors v. Brannan*, 201 F.2d 471, 479-80 (7th Cir.), cert. denied, 345 U.S. 997 (1953), on appeal from decision by USDA's Judicial Officer:

Often the "most telling part" of the evidence is not apparent from the printed page, "for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors". *N.L.R.B. v. Universal Camera Corp.*, 2 Cir., 190 F.2d 429, 430. Thus, "we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth." *Ohio Associated Tel. Co. v. N.L.R.B.*, 6 Cir., 192 F.2d 664, 668.

. . . In addition, the technical and complex nature of the charges made necessitated recourse to extensive use of expert testimony, for here, as is often the case in proceedings under regulatory statutes, the evidence is largely of a dual nature: statistical and parol interpretation of the statistics. In the latter aspect the referee [ALJ] again possesses a greatly advantageous position, for, as the several experts testify, he is able to ascertain their grasp and knowledge, their perspective and understanding of the materials presented to them for interpretation. Their conduct on the stand may enhance or belie their status as experts. In short, anyone who has observed witnesses on the stand will know that those "who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of courts of review who do not enjoy the same advantages." *Jennings v. Murphy*, 7 Cir., 194 F.2d 35, 36.

It would seem, then, that the function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates. It is

v. Universal Camera Corp., *supra*. With this in mind we approach the proof offered in this proceeding.

Similarly, in *Cella v. United States*, 208 F.2d 783, 788 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), a case involving false weights under the Packers and Stockyards Act, the court stated:

The hearing officer observed these witnesses upon the stand. He was the trier of the facts. The matter of their credibility was for him to decide. *Great Western Food Distributors v. Brannan*, 7 Cir., 201 F.2d 476, 479.

Finally, in *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970), also involving false weights under the Packers and Stockyards Act, the court stated:

When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. *National Labor Relations Board v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952); see also *United States v. Oregon Medical Society*, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

*Accord Blackfoot Livestock Comm'n Co. v. USDA*, 810 F.2d 916 (9th Cir. 1987).

The "hopelessly incredible" rule just quoted is cited with approval by Professor Davis, who states in Davis, 3 *Administrative Law Treatise* § 17.16, at 336 (2d ed. 1980):

When the agency adopts the ALJ's findings, the task of the reviewing court is normally easier; a common note that is struck is that an ALJ's findings adopted by the agency may not be upset unless it is "hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952); *International Union v. NLRB*, 459 F.2d 1329, 1351 (D.C. Cir. 1972) (Tamm, Jr., concurring and dissenting); *NLRB v. Stark*, 525 F.2d 422, 425-26 (2d Cir. 1975), *cert. denied* 424 U.S. 967 (1976); *NLRB v. Columbia University*, 541 F.2d 922, 928 (2d Cir. 1976).

However, Professor Davis makes it clear that an agency is in a different position vis-a-vis an ALJ's findings of fact based on credibility determinations than a reviewing court. He states (*id.* at 327):

Because of the provision of § 557(b) that "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision," the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses, and even despite the hearing officer's observation of the witnesses. The law that had been established before the APA continues: "Even on a question of the credibility of contradictory witnesses, notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner." *NLRB v. Tex-O-Kan Flour Mills*, 122 F.2d 433, 437 (5th Cir. 1941).

Moreover, Professor Davis explains that an agency can overrule an ALJ's findings based on credibility determinations irrespective of whether a very substantial preponderance of the evidence supports the agency's decision. He states (*id.* at 332) that the "orthodox doctrine" consistent with Supreme Court decisions is set forth in *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Quoting from the court's decision rather than the abbreviated version in Professor Davis' treatise (*ibid.*):

The findings of the Commission must be accepted by this court if there is substantial evidence on the record considered as a whole to support them. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The Commission's overruling of the Law Judge's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955). And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); *National Macaroni*, *supra*. If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference. *National Macaroni*, *supra*.

The Commission must consider the initial decision of the Law Judge and the evidence in the record on which it was based. *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 138 U.S.App.D.C. 152, 425 F.2d 583 (1970). But the findings and conclusions of the Law Judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal. *OKC Corp. v. Federal Trade Commission*, 455 F.2d 1159 (10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's

dings should be considered on review and given such weight as they merit within reason and the light of judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra*.

*Id.* *Blackfoot Livestock Comm'n Co. v. USDA*, 810 F.2d 916, 920-21 (9th Cir. 1987).

As stated above, I agree fully with the ALJ's findings and conclusions. In the evidence is so strong in favor of complainant's position that I would have reversed the ALJ's findings, if he had decided the case otherwise.

**A Person Charging a Commission in a Livestock Transaction Subject to the Act Is, By Statutory Definition, a Market Agency--Not a Dealer.**

Under the controlling statutory definitions set forth in the Act, a person subject to the Act who buys or sells livestock is either a market agency or a dealer--a market agency if (as in this case) he charges a commission, a dealer if he does not. This was explained in *Spencer, supra*, as follows (46 Agric. Dec. at 410-15; Appendix A at 179-85):

Respondents argue that even if Mr. Donaldson acted as an agent, his activities as an agent fit the definition of the term dealer in the Act, rather than the definition of a market agency (Appeal Brief at 27-30). Respondents' argument, if true, would get them out of the frying pan into the fire. That is, just as a "[r]ose is a rose is a rose is a rose" (Gertrude Stein's Sacred Emily), an agent is an agent is an agent is an agent!

An agent is in a fiduciary relationship with his principals, owing them the highest degree of care and loyalty.<sup>46</sup> The Act proscribes "unfair" or "deceptive" practices by market agencies or dealers (7 U.S.C. § 213(a)).<sup>47</sup> Accordingly, whether respondents acted as a dealer-agent or a market agency-agent when they fraudulently increased the prices and weights involved here is of no consequence in this case. In either case, the same 10-year license-suspension order would be issued, and the same cease and desist order would be issued. All that would change would be the omission of the findings that respondents violated 9 C.F.R. §§ 201.44, 45, which require market agencies to render a prompt and accurate accounting for purchases on order, and make records available for inspection.

Nonetheless, since it is important in the administration of the Act to have the terms market agency and dealer correctly defined by the courts, respondents' argument will be refuted.

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<sup>46</sup>*Restatement (Second) of Agency* §§ 13, 387-431 (1958); *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 102 (D. Minn. 1945) (3-judge ct.); *In re Saylor*, 44 Agric. Dec. [2238, 2395 (1985)] (decision

on remand); *In re Bosma*, 41 Agric. Dec. 1742, 1744, 1751-54 (1982), *aff'd in part & rev'd in part*, 754 F.2d 804 (9th Cir. 1984).

<sup>43</sup>§ 213. *Prevention of unfair, discriminatory, or deceptive practices*

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with . . . the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

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The Act defines the terms "stockyard services," "market agency," and "dealer" as follows (7 U.S.C. § 201(b)-(d)):

When used in this chapter--

. . . .

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, [of] livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.

Under the plain terms of the Act, any person who engages in the business of "buying . . . livestock on a commission basis" is a *market agency*. The term *dealer* is defined as "any person, not a market agency," engaged in certain activities. Accordingly, once a person fits the definition of a market agency (e.g., because he buys on commission), he cannot possibly be a dealer within the meaning of the Act. "Of course, statutory definitions of terms used therein prevail over colloquial meanings." *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 502 (1945).<sup>48</sup>

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<sup>48</sup>*Accord United States v. A. & P. Trucking Co.*, 358 U.S. 121, 124 (1958); *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-76



1958); *M.E. Blatt Co. v. United States*, 305 U.S. 267, 279 (1938); *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 95-96 (1935).

If the statutory definition of dealer had omitted the words "not a market agency," a person engaged in the business of buying livestock on commission would fit the definition of "market agency" and "dealer." But there is no basis for refusing to give effect to the words "not a market agency" in the definition of "dealer." As stated in *Ex parte The Public National Bank of New York*, 278 U.S. 101, 104 (1928):

No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that "significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"

Respondents' argument that if Mr. Donaldson acted as an agent, he was a dealer, not a market agency, within the meaning of the Act is based on erroneous obiter dictum in *Solomon Valley Feedlot, Inc. v. Butz*, 557 F.2d 717, 720 (10th Cir. 1977). The issue in *Solomon* was whether a custom feedlot operator, that was primarily engaged in the business of feeding livestock for absentee owners (such as lawyers and judges), was required to register and post a bond as a dealer because it "aids" its customers in "the purchasing of livestock which are then placed at the Solomon Feedlot for feeding" and "in the sale of the cattle once they achieved the desired weight" (557 F.2d at 718-19). *Solomon Feedlot* did not charge a commission for such buying and selling activities (557 F.2d at 720). "Both sides concede[d] that *Solomon* is not a market agency" (557 F.2d at 719), undoubtedly because *Solomon* did not charge a commission for buying or selling activities. In holding that *Solomon Feedlot* was not a dealer, the court said (557 F.2d at 720):

It would appear that the three groups of people engaged in purchasing livestock as dealers include (1) packers-buyers who are employed by packing plants to acquire cattle for slaughter; (2) commission people such as order-buyers; and (3) speculators, who buy in their own name to resell.

The literature of the Packers and Stockyards administration supports this view of the Act. See PA-399, *The Packers and Stockyards Act, What It Is—How it Operates*. The above groupings are recognized in that literature which also recognized the distinction between the one who is regulated because he is

engaged in the business in accordance with the statute and one who makes profit as a result of improving the animals.

As shown above, "commission people such as order-buyers" cannot possibly be dealers, under the Act, since they are included under the express definition of the term "market agency," and the term "dealer" is defined as "any person, not a market agency" (7 U.S.C. § 201(d)). Accordingly, the court's obiter dictum is erroneous.

The *Solomon* decision and the literature of the Packers and Stockyards Administration cited in *Solomon* is discussed in *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 227-29 (1980), *appeal dismissed by appellant*, No. 80-1293 (10th Cir. Aug. 11, 1980), as follows:

23/ Presumably, the Court was referring [in the last sentence of its opinion quoted two paragraphs above] to the statement in the pamphlet, p. 2, that "[f]armers, ranchers, and feeders who are not dealers in interstate commerce are not required to register or file bond when buying to restock."

...

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[Since] I issued the P&S literature relied on by the Court when I was Administrator of the Packers and Stockyards Administration [I am particularly aware of the fact that it sheds no light on the issues here.] The literature "explains" the Packers and Stockyards Act regulatory program in six pages. It is a pamphlet designed as a "hand-out" to farmers or other persons interested in the Act in a very general way. It does not purport to go into all of the precise ramifications of the Act. In giving a general over-view of those subject to regulation, the pamphlet states (pp. 1-2):

All interstate transactions in livestock--cattle, sheep, swine, horses, mules and goats--are subject to the provisions of the Packers and Stockyards Act.

#### SUBJECT TO REGULATION

Market agencies--persons or firms which buy or sell livestock on commission or furnish other services in connection with the purchase or sale of livestock.

Dealers--persons or firms engaged in the business of buying and selling livestock for speculative purposes.

Packer buyers--persons regularly employed by packers to purchase livestock for slaughter.

Meat packers--whether buying livestock at stockyards, at their packing plants or in the country.

....

In other literature distributed by the agency during the same general time period, the term dealer was defined in broader terms. In PA-810, Questions and Answers on the Packers and Stockyards Act for Livestock Producers (USDA, P&SA, July 1967), it is stated at p. 1:

Q. Under the Act, what is (1) a market agency, and (2) a dealer?

A. (1) A market agency is defined as any person engaged in the business (interstate) of (a) buying or selling livestock on a commission basis, or (b) furnishing stockyard services.

(2) A dealer is defined as any person, not a market agency, engaged in the business (interstate) of buying or selling livestock either on his own account or as the employee or agent of the vendor or purchaser. Dealers are *often* called traders or speculators, as they *usually* buy with the intention of reselling immediately. (Packer-buyers are considered as dealers buying for slaughter only) [Emphasis added [in *Sterling*]].

It is readily apparent that the literature cited by the court in *Salomon* does not support its obiter dictum that "commission people such as order-buyers" are "dealers." It is obvious that the court in *Salomon* was merely trying to show that custom feedlot operators are not included in the category of dealers. The court did not have before it the issue as to whether order-buyers buying on commission are

dealers, as distinguished from market agencies. In fact, the *en banc* *Solomon* does not even quote the definition of "market agency."

Although this case will be reviewed by the same court that decided *Solomon*, now that the issue is precisely presented as to whether a person buying on commission is a market agency or a dealer, it is inconceivable that the court would follow its erroneous obiter dictum in *Solomon* rather than the statutory definition. In addition, as stated above, the identical order would be issued in this case even if respondents were held to be dealer-agents, rather than market agencies.<sup>49</sup>

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<sup>49</sup>If respondents had been acting as a speculative dealer, not in an agency capacity, they could lawfully have charged whatever the market would bear, but they would still have committed weight violation by failing to pass along the shrink at which the livestock was purchased. *In re Collier*, 38 Agric. Dec. 957, 967-70 (1979), *aff'd per curiam*, 518 F.2d 190 (9th Cir. 1980) (unpublished). For a discussion of buying and selling livestock with "pencil shrink," see *In re Saylor*, 44 Agric. Dec. [2238, 2462-64 (1985)] (decision on remand), and Campbell, *Packers and Stockyards Act Regulatory Program*, in 1 David Agricultural Law 231, 272 (1981).

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### III. Itemization of a Commission, on Each of the Invoices Involving This Case That Respondent Sent to Customers, Showing That Respondent Was Acting as a Market Agency.

In the present case, the strongest evidence that respondent was acting as a market agency, buying livestock on a commission basis, in the transactions involved in this case, is documentary. That is, respondent's invoices to the customers involved in this case itemize the commission (computed at the rate of 50¢ per cwt, except for two at 40¢ per cwt, and one at \$6 per head), and lists the exact amount of the commission labeled "Commission" or "Comm.," as follows:

Exhibit Number	Commission
CX 4, p. 7	\$ 778.78
CX 5, p. 7	255.15
	33.13
	199.15
	627.93
	476.50
	128.20
	298.59
	168.00

Exhibit Number	Commission
CX 13, p. 4	509.62 <sup>4</sup>
CX 14, p. 6A	247.53
CX 15, p. 11	724.51
CX 16, p. 7	258.88
CX 17, p. 4	258.15
CX 18, p. 4	259.78
CX 19, p. 4	756.35 <sup>5</sup>
CX 20, p. 6	<u>247.74</u>
Total	\$6,227.99

The documentary evidence supports the testimony of complainant's witnesses that respondent told them he was charging them a commission in the transactions. Although respondent had no records to support his assertion that he passed the commissions on to others, that fact, if true, would be immaterial in determining respondent's guilt. Even if respondent owed a commission to someone else on these transactions, there would be no reason for respondent to list that commission on the invoices to the persons to whom respondent sold the livestock, if he were selling on a speculative, dealer basis. As stated in *Spencer, supra* (46 Agric. Dec. at 299-301; Appendix A at 46-48):

Mr. Kienow testified as an expert witness for complainant that the reference in the memorandum to 50¢ commission included would refer to respondents' commission of 50¢ per cwt (Tr. 478-81). Mr. Kienow's testimony, in this respect, is consistent with my own view, based on briefing and arguing Packers and Stockyards Act cases in appellate courts for 10 years, directing the Packers and Stockyards Act regulatory program for 8 years, and deciding cases under the Packers and Stockyards Act for 15 years.

However, Mr. Frye, a CPA who works for a number of livestock firms, testified that the reference to a commission would refer to a commission Donaldson paid to someone else. He testified (Tr. 670-71, emphasis added):

Q. With respect to these documents that you have reviewed, you recall, don't you, that in the course of reviewing them, you came across entries that said "commission"?

A. Yes, sir. I testified yesterday I noticed one that says "com.," to mean commission. I don't remember a dollar amount on the exhibits that I testified to yesterday.

<sup>4</sup>Computed at 50¢ per cwt. Respondent's invoice shows \$549.62, including health inspection.

<sup>5</sup>Computed at 50¢ per cwt. Respondent's invoice shows \$831.35, including health inspection.

Q. You recall, then, seeing a 50 cent seal then on one of these documents? One or several of these documents?

A. I recall seeing the commission on one or several. I don't know that it was the 50 cents. It could have been.

Q. This didn't lead you to wonder whether this was a market agency transaction?

A. No, sir. The commissions that were on those documents are what I call above the line of cattle acquiring cost, not commissions below the line after we total up the cost of acquiring the cattle. The buyer of the cattle [Donaldson] puts the cattle, price, *he puts a commission that he pays to someone else*, he puts his freight, a feed, a brander's help, if that's the situation. He acquires his costs, reports to his principal the sum of those costs with the head cost and maybe the price per head count, and then his commission comes off after that. You report what you paid, not what you're getting. What you're getting comes below the totaling of those other costs. Those which I saw yesterday and which I have just now testified to, that is up there right below a few head of cattle. There's two entries up there, one of them a commission. And now we list cattle down here. If this was an agency commission, the commission is below here. That's below the line cost, an acquiring cost.

Q. When you see an entry labeled "commission", does that cause you to believe that this may be a market agency transaction?

A. No, sir, unless it's below the line, below all the costs of acquiring.

Nonetheless, Mr. Frye conceded that in a dealer transaction, there is no reason for a dealer to tell the person to whom he is selling livestock what commissions or other expenses the dealer paid. Mr. Frye testified (Tr. 683):

JUDGE WEBER: Why would someone purchasing cattle from a dealer be concerned about commissions the dealer may have had, expenses the dealer may have had, arrangements the dealer may have had with the people that he purchased cattle from? It is not an ultimate purchaser's business, is it?

arrangements were, aren't really material or relevant, are they?

THE WITNESS: No, sir.

Similarly, respondent Donaldson testified that the reference to commissions could have meant a commission he paid to somebody else, although he could offer no explanation as to why commissions paid to somebody else would be of concern to feeders (such as Schaake). Mr. Donaldson testified (Tr. 819-20; emphasis added):

JUDGE WEBER: . . . In some instances in the exhibits where people had asked you for documentation, they made notes on information provided by phone and in some instances, there were commissions or abbreviations suggesting the word "commissions" included in the information. Why would the word "commissions" or an abbreviations that perhaps suggests commissions be included in their notes, if you know.

THE WITNESS: I don't know, but if they received the phone call from me, *it could have meant a commission paid to somebody else*. I really couldn't tell you without looking at a particular document.

JUDGE WEBER: If their focus is just on the delivered cost at their expense, why do they care who you paid or what you paid if they are willing to pay your price at their front door? Why would that show up in their notes.

THE WITNESS: I really couldn't tell you.

The 50¢ commission reference in the memorandum is consistent only with a market agency transaction in which respondents were buying for Schaake on a 50¢ commission basis. It is totally inconsistent with a dealer transaction.

In a dealer transaction, the dealer is selling livestock at a specified price, e.g., \$65.50 per cwt. It is totally irrelevant to the buyer from a dealer what the dealer paid for the livestock, either in commissions to someone else or otherwise. There could have been no logical reason for Donaldson to have referred to commissions paid by Donaldson to someone else, in a telephone conversation with Schaake's accountant, Claude Johnson, if a dealer transaction were involved. Hence the memorandum of Donaldson's telephone conversation with Claude Johnson, set forth above, is strong and compelling evidence supporting Schaake's testimony, discussed below (§ II(A)), that his agreement with Donaldson was for Donaldson to purchase livestock for Schaake on a 50¢ commission basis.

In fact, during my 35 years' experience with the Packers and Stockyard Act regulatory program (see *Spencer*, 46 Agric. Dec. at 410 n. 45; Appendix A at 179 n. 45), the *Spencer* case is the only case, other than the present case in which the contention was made that the word "commission" on an invoice referred to a commission that a dealer had paid to someone else. There is no such practice or custom in the livestock industry for a dealer who is an agent to list a commission on an invoice, which represents a commission that the dealer paid to someone else.<sup>6</sup> (Coincidentally, perhaps, respondent "did business" for 2 or 3 years with Mike Donaldson (Tr. 246-48), President and Manager of the firm which defrauded customers in the *Spencer* case the same manner as respondent defrauded customers in this case, except that Mike Donaldson also cheated on weights.)

It is significant, as the ALJ noted, that in other transactions, not involved in this case, respondent sold livestock to some of the customers on a straight dealer basis, without a commission (Tr. 98-99, 112-13, 136-37, 157-58, 175-224; see, also, Tr. 150).<sup>7</sup> For example, Mr. Larry Graham testified (Tr. 113):

MR. KAHAN: . . .

Did Mr. Ferguson ever offer you cattle for a straight price?

THE WITNESS: Yes, he has.

Q. And can you explain what transpired in those occasions and when that was and exactly what was -- what was offered?

A. I don't recall any specific dates, but from time to time he has cattle that he represents as he owns them or has them contracted for and that they are going to cost me an X number of dollars.

Q. He doesn't mention -- during those times, does he ever mention anything about commission?

A. No, sir.

Q. It's just you're buying them for X amount of money?

A. Yes.

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<sup>6</sup>As shown in § VI, *infra*, note 18, the fact that respondent's record of his "gross profit" each transaction includes the amount of the commission shown on the invoices to his customers is additional evidence supporting the view that respondent did not pass on the commission to someone else.

<sup>7</sup>It is a common practice in the livestock industry for a person to operate in so many transactions as a dealer, and in others as a market agency (*Spencer*, 46 Agric. Dec. at 347 Appendix A at 190).



in fact that respondent sold some livestock without a commission to the customers he charged a commission in other transactions strongly supports the ALJ's conclusion that respondent knew exactly what he was doing, and made a deliberate and calculating effort to deceive the livestock farmers involved in this case.

Respondent relies on his version of the testimony of complainant's pricing specialist, Mr. Patrick D'Agostino, for support for his argument that, at most, respondent merely failed to fill out invoices precisely as complainant desired, when there is no precise regulation specifying how a farmer must invoice his accounts. Respondent argues (Appeal Brief at 7-8):

23. Patrick D'Agostino, sanction expert for the complainant, whose office is in Washington, D.C., admitted that the regulations do not precisely tell a dealer how he is to bill his customers. T. 347. He admitted the only regulation that came close to that was the regulation that says that records and accounting should be accurate. T. 348. There is no regulation that says a dealer must invoice his accounts a certain way. T. 348. D'Agostino testified, in response to a question of the ALJ, that if 1.) Ferguson were a dealer, 2.) sold these cattle to the farmers, 3.) adds on a commission, and 4.) the farmers because of circumstances think he is a market agency, there would be nothing wrong with the way respondent invoiced his accounts.<sup>3</sup> T. 348-349.

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<sup>3</sup>The answer of D'Agostino seems a little unclear, but he seems to admit that if Ferguson were in fact a dealer, and the facts are that the farmers believe he is a market agency, Ferguson did nothing wrong in the way he invoiced his accounts. But D'Agostino went on to say that there could be a misrepresentation, and if it is a misrepresentation, it is worthy of a suspension.

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24. Respondent's counsel asked D'Agostino to assume that respondent was a dealer, sold these cattle as a dealer, and added on a commission which he had to pay someone else. D'Agostino said that would not be a violation. T. 350 lines 13-22.

25. Specifically, as is relevant to this case, the regulations do not state that a dealer can or cannot charge to a person to whom he sells livestock the amount that the dealer had to pay in commissions or other expenses. Mr. D'Agostino admitted that respondent could have charged the total amount that he charged to the buyer with no problem. T. 353 line 22, T. 354 line 9. However, the regulations do not state that a dealer must sell livestock to his buyer with a "laid in" price or a total, unitemized price, as opposed to selling livestock to his buyer for a purchase price plus expenses.

26. D'Agostino admitted that respondent may have been uninformed:

Q. Would you agree with me if I say that Jeff Ferguson may not have been fully informed as to how the Packers and Stockyards Administration expected him to invoice his customers?

A. I guess I would agree with that. (T. 357)

27. Respondent saw nothing improper with selling cattle to his buyers with his understanding that he would charge them a purchase price per pound, plus out-of-pocket expenses, such as freight, veterinarian expenses, and commission that he had to pay to others. With this understanding in mind, respondent would call people who might be interested in buying feedlot cattle, and he would discuss the type of cattle, quality, etc., and he would tell the buyer that he could sell him certain cattle at a certain price per pound, plus freight, local charges, and commission.

However, respondent's brief does not accurately describe Mr. D'Agostino's testimony. His testimony, viewed in its entirety, is to the effect that a person who shows a commission on his invoice to his customer is acting as a market agency--not a dealer. A dealer can lawfully add whatever profits or expenses he wants to add onto his purchase price, including a commission paid to someone else, but if he shows a commission on his invoice to his customer, he is acting as a market agency, not a dealer, and must account accurately. Specifically, Mr. D'Agostino testified (Tr. 347-50, 352-56):

Q. Was there any regulation that comes close to telling us how a dealer should bill his customers?

A. There's just a regulation that says that records and accounts should be accurate.

Q. They should be true and correct?

A. Correct. True and correct.

Q. But there's no regulation that says a dealer must invoice his accounts to his buyers a certain way?

A. No, there isn't.

Q. Now, if there is no such regulation, how would a 27-year-old man know how he's supposed to invoice his accounts to his buyers?

a question of a dealer.

Q. Yes. This man was registered as a dealer, wasn't he?

A. He was registered as a dealer, but I don't think he was necessarily operating that way.

Q. Well, let me ask you to assume, then, as a hypothetical, that Mr. Ferguson was a dealer.

JUDGE PALMER: Think of it this way. Let's -- let's assume that he's registered as a dealer. We know he's registered as a dealer. Let's assume he's really a dealer. He's selling these cattle to these people, but in the course of selling these cattle to these people, he's adding on a commission and doing it under circumstances wherein they may think that he's an order buyer, but, in fact, he really is a dealer. And then go on with your question.

I'm putting, sort of, words in his mouth, but that's, I think, one other way to look at this whole transaction, see.

MR. EFTINK: Under that circumstance, what -- what would tell him how he is -- Let me try that again.

JUDGE PALMER: Well, let me finish. I set it up that way. Is there anything wrong in him invoicing the accounts the way he is?

THE WITNESS: There would be nothing wrong with that, sir, but he wouldn't be operating as a dealer. He would be operating as a market agency, buying or selling on commission. Buying on commission.<sup>5</sup>

JUDGE PALMER: Well, wait a minute. Think of it this way. I think you're having some trouble with this concept. He's a dealer. He's really selling these cattle, but he's telling these people he's something else. He's registered as a dealer, but he's letting them think he's an order buyer, but he is really a dealer. But he sends out the kind of paper that goes with a market agent, an order buyer, because that's the way he enhances the price that he's asking for these cattle. Now, is that violative of the act, in your opinion?

THE WITNESS: Yes, it would be. It's a misrepresentation.

JUDGE PALMER: All right. What kind of sanction is appropriate for that kind of violation of the act?

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<sup>5</sup>All of Mr. D'Agostino's testimony must be read in the light of this vital point, viz., that when respondent adds a commission onto his invoices, under circumstances where his customers think he is acting as a market agency (order buyer), respondent is, in fact, operating as a market agency, buying on commission.

THE WITNESS: A cease-and-desist order.

JUDGE PALMER: Anything else?

THE WITNESS: I think there could be a suspension imposed in a case like that.<sup>9</sup>

JUDGE PALMER: Do we have any cases that have been decided along those lines, where we've had sanctions imposed?

THE WITNESS: I can't think of any offhand.<sup>10</sup>

....

MR. EFTINK: Let me ask you to assume that Mr. Ferguson was a dealer and he was selling cattle to these farmers and he had to pay a commission to Bob Deeson and he added that commission on in the sale to the customers. Now, is that a violation of the Act?

THE WITNESS: He's selling as a dealer and he added the commission on?

Q. And he paid the commission to Bob Deeson. Is that a violation?

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<sup>9</sup>Where a person misleads his customers into believing that he is acting as a market agency the suspension would be identical to the suspension imposed where the person actually was a market agency. In fact, I reject the hypothesis that a person can hold himself out to his customer as being a market agency in a particular transaction, i.e., by charging a commission without actually being a market agency in that transaction. *Spencer* (46 Agric. Dec. at 410-12; Appendix A at 179-85). As stated in *Spencer* (46 Agric. Dec. at 338; Appendix A at 88c):

Each of the three feeder witnesses involved in the transactions at issue in this proceeding is an eminently qualified expert in the field of livestock marketing. Each testified categorically that his agreement with Mike Donaldson was for Donaldson to buy the livestock involved in this proceeding on a 50¢ per cwt commission basis. Their testimony to that effect, strongly supported by undisputed documentary evidence, is set forth in this section. The ALJ found the credibility of the feeder witnesses to be "strong and persuasive" (Initial Decision at 2), and that of Mike Donaldson to be, "at best, weak" (Initial Decision at 6).

Since I believe the testimony of the three feeder witnesses as to their agreement with Mike Donaldson, there is no need for me to consider other circumstances indicative of an agency relationship. That is, if there is an express agreement between two persons that one is to act as the agent of the other [i.e., that the agreement was for a 50¢ per cwt commission], an agency relationship is formed, and there is no need to consider whether other circumstances point in the direction of an agency relationship or a dealer transaction. *Restatement (Second) of Agency* §§ 1, 14K, 15, 26 (1958).

<sup>10</sup>The *Spencer* case, *supra*, is identical (except for *Spencer's* additional weight fraud and price violations) to the present case.

A. No, I don't think that would be.<sup>11</sup>

...

Q. Now, would you agree that, since the regulations don't spell out how a dealer is supposed to invoice his accounts, and assuming that Mr. Ferguson was acting as a dealer, that he might not have known he was doing it wrong? Would you agree with that?

A. At one point, I would have been inclined to think that it could have been a mistake. But after a close analysis was done of the profits shown on some of Mr. Ferguson's invoices, there was almost -- my opinion was there was intentional profits made, the way profits were reflected. Not only was the markup shown, but the commission was shown, and in some cases, the health was shown when no health expenses were incurred.

...

Q. Now, that [CX 5, p. 7] is the invoice to Mr. Elser. Would there be any violation if Jeff Ferguson sold cattle to John Elser and on that invoice he only put down one thing, and that is \$33,643?

A. And that's all, no price, nothing else?

Q. That's all. Just the dollar amount, the bottom line.<sup>12</sup>

A. I guess I -- I couldn't say for sure whether there would be a violation or not, because I wouldn't know what the nature of the agreement was between Mr. Ferguson and Mr. Elser.

Q. I'm just asking about the manner in which he's billed. If he just -- as we discussed in this hearing, if he filled out the invoice and just put the price, the number of head of cattle, the name of the customer and all that, and made it a straight dealer transaction, is there anything wrong with that?

A. No, he could invoice that way.

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<sup>11</sup>The witness obviously had in mind that the invoice would not list the commission separately, but would merely include it in the price charged to the customer, since his testimony accompanying notes 8 and 9, *supra*, shows that it would be a violation if the commission were stated as a commission on the invoice.

<sup>12</sup>As shown in § IV, *infra*, livestock is either sold on a per head basis (in which case the "dollar amount, the bottom line" is shown without a price per cwt), or on a weight basis (in which case the agreed price per cwt is shown on the invoice).

Q. But you're saying it's wrong for him to itemize it like this. Isn't that what you're saying?

A. No, no. It's not wrong to itemize. The assessment -- the charging of a commission here is an earmark that this particular transaction was an order-buying [market agency] transaction. But this of itself --

Q. Can you define that for us? Can you define an order buyer for us?

A. An order buyer is a market agency buying on commission.

Q. Where is that defined?

A. That's defined in the act, under "Definitions."

Q. Okay. Can you find it for us?

A. In the Packers and Stockyards Act?

Q. Yes, please.

A. Yes, sir, it's under "Definitions," in the front of the act. I'll quote it for you.

Q. Okay.

A. A market agency --

Q. Okay. See if you can find the definition of an order buyer and read it for us.

A. I don't have the definition of an order buyer.

Q. That's what I asked you for.

A. No, I said a market agency was.

Q. I asked you what the definition of an order buyer was.

A. Well, then I misunderstood your question.

JUDGE PALMER: What are you looking at? Let me see it.

THE WITNESS: I'm looking at the definition of a market agency, sir.

JUDGE PALMER: Okay.

MR. EFTINK: Now, just for clarification, I'll ask the question again. Where is the definition of order buyer in the act?

THE WITNESS: There is no definition per se in the order buyer in the act.

Q. Well, let's don't worry about this "per se" stuff. Is there a definition anywhere of any kind of order buyer in the act?

A. No.

Q. Is there a definition of order buyer in the regulations?

A. No.

Q. Now, how does Jeff Ferguson know what the definition of an order buyer is?

A. Jeff Ferguson knows whether he's operating on a commission basis or not. And if Jeff Ferguson had read the act and the regulations, just the word "commissions" should -- should catch his eye, and he would know whether he was operating as a market agency or as a dealer.<sup>13</sup>

Q. Can you point out in the act where you get that?

A. Well, his first inclination should be, "Where do I fit in this definition? Am I market agency, or am I a dealer?" And --

Q. What you said was that the use of the word of "commission" should lead him inexorably to believe that he is a marketing agency, and I ask you to tell me where in the act he derived the source of that.

JUDGE PALMER: I understand what he's pointing to in the act [(7 U.S.C. § 201(c), (d))]. I read it myself. Let's not debate that too much longer. You'll argue that in brief, I think.

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<sup>13</sup>As the witness correctly explained, it is immaterial whether respondent knew the definition of an order buyer (although it is a very common term used in the livestock industry to describe a market agency buying on commission). It is only important that the Act clearly defines a person charging a commission as a market agency, and the Act and regulations require a market agency to account accurately to principals.

IV. The Fact That Some of Respondent's Invoices Do Not Show a True Price Per Cwt, but, Rather, Show Only the Average Cost of the Livestock, Shows That Respondent Was Acting as a Market Agency, Rather Than Selling Livestock as a Dealer at an Agreed Price.

There are two other circumstances that strongly support the ALJ's finding as to three of respondent's customers (Harrington, Elser, and Graham), that respondent was acting as a market agency. First, as to two of the customers (Harrington and Elser), there is no true price per cwt shown on respondent's invoice to the customers (CX 8, p. 9; CX 11, p. 6). Specifically, on CX 8, p. 9, the "WEIGHT" for 72 steers is 52,060 pounds (or 520.60 cwt), the "PRICE" is \$62.44 (per cwt), and the "AMOUNT" is \$32,510.88. But multiplying "PRICE" by the "WEIGHT" equals \$32,506.26, or \$4.62 less than "AMOUNT." Hence the "PRICE" (\$62.44) is not actually a sales price. Rather, it is the average cost of the livestock, which is calculated by dividing the "AMOUNT" by the "WEIGHT" ( $\$32,510.88 \div 520.60 = \$62.44$ ). Accordingly, the documentary evidence proves that these 72 steers were sold to Paul Harrington on a dealer basis at a specified price per cwt. There is no actual price per cwt shown on the invoice!

Similarly, the "PRICE" for 83 heifers shown on the same invoice, \$57.95, is not the actual price of the heifers, since multiplying that "PRICE" by "WEIGHT" (52,595 pounds) equals \$30,489.32, whereas the "AMOUNT" shown on the invoice is \$30,492.35, or \$3.03 more (CX 8, p. 9). The "PRICE" shown on the invoice for the 83 heifers is actually the average cost ( $\$30,492.35 \div 525.95 = \$57.97$ ).<sup>15</sup>

The identical situation is true with respect to the invoice to John Elser for 48 heifers (CX 11, p. 6). The "PRICE" (\$61.35) times the "WEIGHT" (35 cwt) equals \$21,702.56, whereas the "AMOUNT" shown on the invoice is \$21,705.70, or \$3.14 more. The "PRICE" (\$61.35) is actually the average cost determined by dividing the "AMOUNT" by the "WEIGHT" ( $\$21,705.70 \div 353.75 = \$61.35$ ).<sup>16</sup>

These invoices are "smoking guns," proving that respondent did not sell these steers and heifers on a dealer basis at an agreed price per cwt. There is no price per cwt shown on the invoices, only an average cost figure. This is typical of a commission transaction, but never occurs in a dealer transaction where an agreement is reached as to a price, which is then multiplied by weight to produce the "AMOUNT."

<sup>15</sup> Respondent could have rounded this to \$62.45, which is the amount (erroneously) shown on its recapitulation sheet (CX 8, p. 1). But even if we used \$62.45 as the "PRICE," it is not a true "PRICE" figure, since  $\$62.45 \times 520.60 = \$32,511.47$ , or \$0.59 more than the "AMOUNT" on the invoice.

<sup>16</sup> to \$57.98.

\$61.36.



This same type of proof was held to be totally destructive of Mike Donaldson's argument in the *Spencer* case, identical to that of respondent here (46 Agric. Dec. at 328-38, 351-67, 373-76, 383-87; Appendix A at 80-88e, 104-26, 133-36, 145-46). As stated in *Spencer* (46 Agric. Dec. at 331-32; Appendix A at 84-85a):

The fact that the figures under the heading "PRICE" on respondents' invoice to Schaake are not really the price that was charged per cwt on each lot completely destroys respondents' argument that they were acting as a dealer and selling animals at whatever price they chose to sell them. The "PRICE" figure shown on the invoice is not even a price at all--rather, it is merely the average cost of the animals.

"Dealers follow two methods of buying and selling livestock. Some transactions are made on a per head basis, while other transactions are on a weight basis." Fowler, *The Marketing of Livestock and Meat* 311 (1961). Where a dealer is selling feeder livestock by weight, rather than by the head, somewhere on the invoice the dealer must show the price per pound or per cwt. Otherwise, there is no way to determine from the invoice whether the amount has been correctly computed. Respondents' failure to show an actual price per cwt on their invoice shows quite clearly that they were not selling as a dealer (at a set price agreed to by the parties).

Respondents' purported expert witness, John Frye, a Certified Public Accountant with a large livestock industry practice, admitted that in a normal dealer transaction, livestock is priced at a certain price per hundredweight, e.g., \$62.50 per cwt. He testified (Tr. 672-73):

Q. But isn't it true that in a dealer transaction the costs aren't passed along per se, that the cattle are just priced out at a delivered cost?

A. I'm sorry. Would you ask again, please?

Q. In a dealer transaction, aren't the cattle just priced at a price per hundredweight?

A. In a dealer transaction?

Q. Yes.

A. In most cases that's usually the truth, yes.

Q. That if I am going to sell to you, if I am a speculator, or since -- you have correctly defined dealer. Let me use that term. Say I am a dealer and I'm going to sell to you and I get

in touch with you and say, "Mr. Frye, I propose and I will sell you 100 head of livestock," and I tell you the type and I tell you all the circumstances, and I am going to price them to you at \$62.50 per hundredweight, wouldn't that be the way a normal dealer transaction occurs?

A. Yes, sir.

Respondents' failure to show any true "price" on their invoice is a highly significant circumstance supporting Mr. Schaake's testimony that these were commission transactions.

Lest someone should misconstrue the point of this discussion, the figures under the column "Difference" on the off-centered invoice set forth above, *supra*, p. 82, are not the amounts by which respondents cheated Schaake. For example, the "Difference" figure for the first (144-head) lot shown on the off-centered invoice reproduced above is only \$6.09, but if (as the ALJ and I have found) these 144 head were sold to Schaake on a 50¢ per cwt commission basis, respondents cheated Schaake out of \$924.08 on these 144 head (by falsely "inflating" the costs) (CX 41, p. 1, column 23; Stipulations filed July 23, 1985, at 6, ¶ 9(a)). The only purpose of this discussion is to show that there is no true price shown on the invoice; i.e., the figures under the heading "PRICE" are actually the average cost.

It is not unusual for an invoice to show not only the price, but, also, the average cost. But where a dealer is selling livestock by weight, the invoice must, of course, show the actual price of the livestock to be multiplied by the weight. To illustrate, the Kansas City invoice reproduced on the following page is taken from *In re Saylor*, 44 Agric. Dec. [2238, 2272 (1985)] (decision on remand).<sup>17</sup>

**V. The Fact That Some of Respondent's Invoices Show the Price in "Odd" Amounts, e.g., \$57.97 Per Cwt, Is Strong Evidence That Respondent Was Acting as a Market Agency.**

The second circumstance strongly supporting the ALJ's findings that respondent was acting as a market agency in transactions with Harrington and Graham is that the invoices to Harrington and Graham show the "PRICE" is "odd" amounts (not divisible by 5), viz., \$62.44 per cwt for 72 steers, \$57.97 per

<sup>17</sup>The same point is illustrated by examining any of the invoices in the present case showing the purchase prices paid by respondent when he originally procured the livestock from a person selling on a dealer basis (CX 4, p. 2; CX 5, pp. 2, 4; CX 6, p. 2; CX 7, pp. 2, 4, 6; CX 8, pp. 2, 4, 6; CX 9, pp. 2, 5; CX 10, p. 2; CX 11, pp. 2, 4; CX 12, pp. 2, 3; CX 13, p. 2; CX 14, pp. 2, 4; CX 15, pp. 2, 4, 6; CX 16, pp. 2, 4; CX 17, p. 2; CX 18, p. 2; CX 20, pp. 2, 4). The "PRICE" multiplied by the "WEIGHT" equals the "AMOUNT" (or "TOTAL" in some cases) on each of those invoices. That is, each of the sellers was selling on a dealer basis at an agreed price per cwt.

r 83 heifers (CX 8, p. 9), and \$66.48 per cwt for 35 steers (CX 10, p. 4). "odd" prices are strongly indicative of a commission transaction. As in *Spencer* (46 Agric. Dec. at 383-87; Appendix A at 146-49):

As the ALJ stated, the "record shows that as a practical matter alers just don't price their livestock at ["odd" prices such as] \$60.46 \$64.86" (Initial Decision at 30). Dealers price their livestock at ices in which the cents-figure is a multiple of five, e.g., \$60.10, \$60.25.

Mr. Kienow, complainant's expert witness, testified that spondents' pricing of the livestock in "odd" amounts and the large ivances by the dealers to respondents were the two primary factors long with the statements of the feeders) that indicated an agency lationship between respondents and the feeders (§ III, *supra*).

Mr. Van de Graaf testified that a dealer never prices livestock in an dd" amount. He testified (Tr. 315):

Q. My question to you is, if this was a transaction where you were purchasing livestock from a speculator, and I realize that you do not commonly, you do not ordinarily purchase from speculators, if this was a transaction where you were purchasing from a speculator, would you expect to see a price of \$60.94? Does that look like a price that a speculator would have?

A. No.

Q. Why not?

A. A speculator, if he says he is going to sell you cattle, it would be, let's say, 61 cents or maybe 60.75 or 60.50. It is a even number; it is never an average number like that.

Similarly, Mr. Monson testified that dealers never price livestock in n "odd" amount. He testified (Tr. 373-74, 403, 405-06):

Q. If you would also take a look on Complainant's Exhibit 11, page 6?

A. Page 6?

Q. Yes. Under the price column, what do those prices, \$60.41, \$64.76, tell you about the nature of this transaction?

A. That it was a commissioned transaction.

Q. Why would that be?

A. Well, I would never buy, I have never in my life ever bought a set of cattle from anybody on a delivered basis at \$60.41. It is either 60-1/4 or 60-1/2. Nobody breaks it off to the penny. This indicates very clearly without a question of a doubt that it is a commission transaction.

....

A. ... I would never buy cattle from anybody, anybody, for 60.46 or 60.49 without it being a commission purchase.

....

Q. You indicated that you believed this to be a commissioned bill because of the way the price is stated, that is it is stated in odd figures?

A. Absolutely.

....

Q. Mr. Monson, can you remember purchasing livestock from a speculator who assumed or was responsible for the cost of trucking and who invoiced you on an uneven amount such as the amounts shown on these invoices?

A. Never. Never to my knowledge have I ever seen anything like this on a prospective basis, speculative basis.

Mr. Schaeke testified in a similar manner as to "odd" prices. He testified (Tr. 227):

Q. You have testified that this was a commission transaction. Would you expect to find a price like that, 64.86, if this was a transaction which Mr. Donaldson was speculating, buying and selling for his own account?

A. No, I wouldn't.

Q. Why not?

A. Well, I believe if I bought cattle from Mike [Donaldson], bought cattle that way, he calls me and he has cattle to oot think he has ever priced them at an odd figure like ---- me he would have assumed those cattle at 65-1/2, an even figure.

Respondents' purported expert witness, Mr. Frye, testified to the contrary. He testified (Tr. 596-99):

Q. Also looking at Exhibit 11, 8, we see there the prices for the cattle. That is with respect to the 65 heifers, \$60.40 [\$60.41 on CX 11, p. 8] and with respect to the steers, \$64.76. Do you have an opinion as to whether that unevenness of the cents in the price column reflects orders or reflects the existence of a dealer transaction?

A. I have an opinion. The uneven dollars in that price that you mentioned would lead me to believe that this is a dealer transaction, not an agency transaction.

Q. Why is that?

A. When I talk to my livestock clients and ask them how the market is, they say that the price is fifty-nine, sixty-one, fifty-eight, and they quote those as hundredweight, and they are talking the whole dollars.

When they go to the stockyard facility, the auctioneer does not ask for the pennies or the dimes or the nine cents. He wants a quarter up. When the farmers and ranchers read the quotation in the paper daily, the Omaha, it says it is 50 cents higher to a dollar, it is 2 lower, steady, or unsteady; but they are quoting them as even.

Therefore, I think that the man raising the livestock is thinking of whole dollars. If I have an agency transaction in my example of the 59 cents, then an agency transaction will charge a commission based on one hundredweight.

The 59 cents is that way. If he is charging 59 cents a hundred or 39 cents a hundred, that still makes it even.

So, the agent would buy. The rancher pays the 59 and I would make a 59-1/4 or 59.75.

With that commission being added on to it, it will keep it in whole dollars. The dealer, however, is still thinking that way and he is still dealing with the farmer and he is thinking of whole dollars.

When the agent bought the cattle, the only expense that he has is probably none. He has bought them and he has his commission.

The dealer is going to have to pay the brand inspection. Where the principal of the agent is going to pay that, the dealer is going to have to pay some trucking and help in some branding or whatever, so he is now getting some funny costs in there.

He has got a \$209 freight bill and \$13.50 brand or whatever. So, now, his costs aren't there. He could have bought them at fifty-nine, the same as the agency man.

Now, he has got to be paid for those. When the agent buys it, the weight is the same as when the dealer buys. The head count is the same and the kind of animals are the same. The only thing, then, that can be changed by the dealer to get those costs -- you only sell the weight. You sell the same head count, same kind. You get those count.

Then, the price has to come up or down. That is what makes the game, because the trucking is not by weight. It is by miles. The miscellaneous other expenses are by head count.

He puts them in somewhere by feed. It is a dollar, dollar and a half per head. That is not hundredweight.

Therefore, his price is not going to be even anymore. Dealers' prices aren't even. Agency prices are.

This, again, shows Mr. Frye's lack of expertise as a livestock marketing specialist. It is true that a dealer's costs would be in odd amounts. But it is the universal practice in the United States for dealers to price their livestock in even amounts. Dealers are free to charge what the traffic will bear for livestock. As complainant's expert witnesses testified, dealers just do not price livestock in "odd" amounts. The "odd" prices stated by respondents as to the four transactions listed at the outset of this section are strongly indicative of commission transactions.

By way of illustration, the prices paid by respondent, when he only procured the livestock involved in this case from the persons selling to him on a dealer basis, all end in "0" or "5." The only "odd" price shown on an invoice to respondent is one from Western Order Buyers, Inc., for 120 steers, where the "PRICE" is \$63.37 (CX 19, p. 2). But in that transaction, Western Order Buyers, Inc., charged respondent a commission of \$567.26, so the documentary evidence shows that this was a commission transaction--not a dealer transaction (see, also, Tr. 267). In respondent's other transactions

**6. Respondent Knowingly Increased the Health Inspection Fees Invoiced to Customers Over the Health Fees Paid by Respondent.**

The documentary evidence also shows that, in addition to respondent's 96.71 fraudulent price increases (Finding 3), respondent fraudulently raised the health inspection fees by relatively trivial amounts. For example, respondent paid \$70 for health inspection (CX 4, pp. 2, 4), but invoiced the customer at \$75 (CX 4, p. 7). He paid \$22.50 (CX 5, p. 6), and invoiced the customer at \$25 (CX 5, p. 7). He paid \$12 (CX 14, p. 4), but invoiced the customer, Floyd Lux, at \$25 (CX 14, p. 6A). As to this last action, complainant's opening brief filed December 4, 1987, explains that "documentary evidence proves that respondent knew he was making a fraudulent health inspection gain, viz. (Brief at 6):

At the bottom right hand corner of almost all of respondent's duplicate copy of the invoices given to respondent's customers was a "gross profit" figure. In most cases, this figure may be computed from other amounts and numbers found in respondent's records, namely by adding the undisclosed increase in price of the livestock to the commission respondent charged, which would equal respondent's "gross profit." However, this was not always the case. Examining the transaction set forth at CX 14, the October 8, 1985, purchase of 61 head on a commission basis for Floyd Lux, the "gross profit" figure on respondent's invoice is shown as \$836.63 [(CX 14, p. 6A)]. Adding the undisclosed gain of \$676.10 (CX 14, p. 1) to the commission of \$247.53 which respondent charged Mr. Lux (CX 14, p. 6A) equals \$923.63, \$70.00 more than respondent's "gross profit" notation. However, subtracting the \$100.00 adjustment which respondent gave on "2 ripples" (CX 14, p. 6A) and adding \$13.00, the fraudulent increase respondent took for health inspection, permits one to arrive at respondent's "gross profit" amount. [That is, the documentary evidence shows that respondent paid \$12 for the health inspection (CX 14, p. 4), but invoiced it to his customer at \$25 (CX 14, p. 6A), an increase of \$13.] Respondent never explained why his "gross profit" included the fraudulently increased amount for health inspection, but the fact of its inclusion in his gross profit calculation is conclusive evidence that respondent knew the change was false.<sup>18</sup>

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<sup>18</sup> Respondent's gross profit figure includes the commission shown on the invoices, but does not include other items shown on the invoices that were obviously paid to someone else, such as bit and health inspection fees. (In some cases, the freight charges might have been passed to respondent's separate trucking business.) If the commissions were, in fact, passed on to someone else, respondent's gross profit figures would have been meaningless. I infer that respondent did not take the time and effort needed to compute a meaningless set of gross profit figures, i.e., I infer that respondent did not, in fact, pass on the commissions to anyone else. In any event, as shown in § III, *supra*, even if the commissions were passed on to others, this would be immaterial in determining respondent's guilt.

Respondent's testimony comes close to admitting that he knowingly made small markups on the health fees invoiced to some customers to make up for other customers who would not pay health inspection fees. He testified (300):

A. . . . Like I said, I'm not in the business to make money on health inspections. I have made -- apparently made some errors on here. Some people don't want to pay it and won't pay it, so I have to stand it, even though the buyer, you know, basically is obligated to pay it. So I'm not -- you know, I'm not trying to make any money on -- on health inspections. At the end of 12 months, I'd like to just even keel, you know: I pay out so much for health; I receive so much for commission.

In order to "even keel" at the end of 12 months, when some customers don't pay health inspection fees, you have to pad the health fees on other customers! This ties in with respondent's philosophical views as to how to do business. He testified (Tr. 221) (emphasis added):

A. . . . I don't want any -- I never want to be sitting in this chair again. I consider myself an honest, straightforward individual; and I have good cattle, as you heard the testimony of my customer yesterday, on good weights. And that's all I want to do, is buy cattle and be honest, *as honest as this business will let me be.*

Respondent's brief on appeal argues that "respondent admittedly rounded up the dollar amount [of health inspection fees] on others (i.e., from \$22.50 to \$25)." There is no such admission in the record, except for the admissions referred to in the two preceding paragraphs. Moreover, there is no basis for regarding respondent's fraudulent health inspection increases as "rounding" increases. Other figures on the same invoices are shown to the nearest penny! For example, the invoice to respondent's customer showing a health fee of \$25 (CX 5, p. 7), when respondent only paid \$22.50 (CX 6), shows the "AMOUNT" as \$31,382.84, which was rounded to the nearest penny ( $510.29 \times \$61.50 = \$31,382.835$ ). It further shows the "Commission" as \$255.15, which was rounded to the nearest penny ( $510.29 \times \$0.50 = \$255.145$ ). The freight is invoiced at \$1,980.50 (CX 5, p. 7), again not rounded to the nearest dollar. Hence the increase in the health fee from \$22.50 to \$25 is fraudulent padding--not harmless "rounding."

Similarly, as to the Floyd Lux transaction discussed above, where the documentary evidence shows that respondent knew he was raising the health fee from \$12 to \$25 (CX 14, pp. 4, 6A), the "AMOUNT" for 53 steers is \$24,301.23, which was rounded to the nearest penny ( $422.63 \times \$57.50 = \$24,301.225$ ), the "AMOUNT" for 8 steers is \$4,164.15, which was stated to the nearest penny ( $72.42 \times \$57.50 = \$4,164.15$ ), and the "Commission" of \$247.525 was rounded to the nearest penny ( $495.05 \times \$0.50 = \$247.525$ ). Hence the increase in the health fee is fraudulent padding--not harmless "rounding."



Respondent argues that the fact that he made adjustments in favor of some of the customers indicates a dealer transaction, but here, as in *Spencer* (46 Agric. Dec. at 394-402; Appendix A at 110-69), that fact is not persuasive. As to the \$97.47 adjustment in the trucking fee (CX 7, p. 8), respondent admitted that he had originally overcharged the customer (Tr. 251; see, also, Tr. 89-90, 94-95). As to the \$61.01 adjustment on big Simmental cross-heifers (CX 15, pp. 10, 11), the customer, Floyd Swanson, testified that respondent agreed to the adjustment because respondent knew that the heifers were too big, and were not the type of animals desired by the customer (Tr. 162-63, 166-67; see, also, Tr. 92-93, 328-29). As to the \$100 adjustment on two cripples in a transaction with Floyd Lux (CX 14, p. 6A), complainant's expert witness testified that, at times, a dealer has to "knock off the price," presumably to keep a customer (Tr. 93-94). If crippling or death is caused by the trucker, insurance should normally cover the loss, which may be initially incurred by the commission agent (Tr. 163-64; *Spencer*, 46 Agric. Dec. at 394-402; Appendix A at 160-69).

#### VII. Respondent's Violations Were Willful.

Under the Administrative Procedure Act, a suspension order cannot be issued unless the violations were willful or a prior warning letter was sent. Specifically, the Act provides (5 U.S.C. § 558(c)):

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

Respondent's violations were willful, within the meaning of that term in the Administrative Procedure Act. As stated in *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974):

Moreover, the "second chance" doctrine would apply only if the violations had not been willful. It is clear enough that under § 9(b) [5 U.S.C. § 558(c)], doing an act which is prohibited and doing it intentionally "irrespective of evil motive or reliance on erroneous advice" or "acts with careless disregard of statutory requirements" are willful. See *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); see also *United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 243, 58 S.Ct. 49, 82 L.Ed. 518 (1938).

Similarly, in *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961) court held:

Petitioner urges his denial of trading privileges amounted to suspension of a license, and that section 9(b) of the Administrative Procedure Act, 5 U.S.C.A. § 1008(b), was violated. We do not reach that question for the same section excludes cases of willfulness. We hold the petitioner's conduct was wilful within the meaning of section 9(b) of the Administrative Procedure Act. We think it clear that a person 1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with such disregard of statutory requirements, the violation is wilful. *East Produce Co. v. Benson*, 3 Cir., 278 F.2d 606, 609.

See also, *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1982); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), cert. denied, 450 U.S. 997 (1981). The definition of willfulness under the Administrative Procedure Act is discussed at length in *In re St. Louis 34 Agric. Dec.* 296, 297-314 (1975). The cited pages from *Shedkin* are set forth as Appendix B to this decision.<sup>10</sup>

Finally, in *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 187 (1973), the Court expressly held that registrants may be suspended under the Packers and Stockyards Act (7 U.S.C. § 204) for negligent or careless violations that are not intentional or flagrant, stating:

The Secretary may suspend "for a reasonable specified period" a registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional

<sup>10</sup>Shedkin explains (34 Agric. Dec. at 306-14) that the decision in *Economou v. USDA*, 451 F.2d 519 (2d Cir. 1971), which held that the violations under the Commodity Exchange Act were willful because the "customary warning letter" was not sent, is erroneous because it nullifies the willfulness exception in the Administrative Procedure Act. Furthermore, it is not the (or custom) under the Packers and Stockyards Act to send a warning letter, is the serious violations. See, e.g., Campbell, *The Packers and Stockyards Act Revisited* Pro

pose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent. *Hyatt v. United States*, 276 F.2d 308, 313 (CA 10 1960); *G.H. Miller & Co. v. United States*, 260 F.2d 286 (CA 7 1958); *In re Silver*, 21 Agric. Dec. 1438, 1452 (1962).<sup>3</sup> The employment of a sanction within the authority of an

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<sup>3</sup>It is by no means clear that respondent's violations were merely negligent. The hearing examiner found that respondent had "intentionally" underweighed livestock, and the Judicial Officer stated: "We conclude then, as did the hearing examiner, that respondent willfully violated . . . the act." (Emphasis added.) "Willfully" could refer to either intentional conduct or conduct that was merely careless or negligent. It seems clear, however, that the Judicial Officer sustained the hearing examiner's finding that the violations were "intentional."

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Administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. *FCC v. WOKO*, 329 U.S. 223, 227-228 (1946); *FTC v. Universal-Rundle Corp.*, 377 U.S., at 250, 251; *G.H. Miller & Co. v. United States*, *supra*, at 296; *Miller v. SEC*, 429 F.2d 856, 858-859 (CA 2 1970); *Dugash v. SEC*, 373 F.2d 107, 110 (CA 2 1967); *Kent v. Hardin*, 425 F.2d 1346, 1349 (CA 5 1970).

Moreover, the Court of Appeals may have been in error in acting on the premise that the Secretary's practice was to impose suspensions only in cases of "intentional and flagrant conduct." [Footnote omitted.] The Secretary's practice, rather, apparently is to employ that sanction in his judgment best serves to deter violations and achieve the objectives of that statute. Congress plainly intended in its broad grant to give the Secretary that breadth of discretion. Therefore, mere unevenness in the application of the sanction does not render its application in a particular case "unwarranted in law."

In the present case, respondent has voluntarily chosen to engage in a duly regulated business. It is his responsibility, as a registrant under the Act, to keep himself informed as to all of the provisions of the Act and regulations. Plaintiff does not have to prove, as an element of willfulness, that respondent actually knew of the regulatory requirements. The record shows, moreover, that respondent admittedly received a copy of the Act and regulations when he requested an application for registration under the Act, but that he did not bother to "read it cover to cover" until the disciplinary complaint was filed in this proceeding (Tr. 216). Respondent was, at the least, careless and negligent as to the requirements of the regulatory program. Accordingly, no warning letter was required.

**VIII. The 6-Month Suspension Order and Civil Penalties (Held in Abeyance) Totaling \$25,000 (Payable Over 5 Years) Are Appropriate for Respondent's Willful, Flagrant and Repeat Violations of the Act.**

Respondent's violations in this case were exceptionally flagrant. Respondent fraudulently marked up the prices in the 17 transactions involved here by a total of \$13,896.71 (Finding 3), which is more than twice respondent's legitimately earned commissions of \$6,227.99. Mr. Patrick D'Agostino, a marketing specialist in complainant's Marketing Practices Branch, testified that defrauding principals in fiduciary transactions is one of the most serious violations that can be committed under the Act. He explained in detail the basis for the administrative recommendation for a 6-month suspension order and civil penalties (held in abeyance) totaling \$25,000 (Tr. 334-47).

Violations of a fiduciary duty are regarded as particularly serious violations of the Act.<sup>28</sup> This was emphasized in *In re Harry Klein Produce Corp.*, 40 Agric. Dec. 134, 169-70 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987), quoting from *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732-33 (1978), which, in turn, is quoting from *In re Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 651, 695-96, 701 (1965), *aff'd sub nom. Mandell, Spector, Rudolph Co. v. United States*, 364 F.2d 889 (3d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967):

In addition, respondent was operating as a commission merchant or factor in consignment transactions and as a joint venturer in the joint account transaction, in both of which capacities respondent had a fiduciary duty to account truly and correctly, to keep adequate and accurate records identifying individual shipments of produce, to remit funds owing and not to commingle the goods of its principals or partners with its own or that of others. It is axiomatic that in this position of trust and confidence discrepancies or confusions created by respondent are to be resolved against it. \* \* \*

\* \* \*

In determining the sanction to be imposed herein, it must be kept in mind that the major violations of the act found herein, that is, the violations of section 2(4) thereof, are, in our opinion, the most serious and flagrant type possible under the act. Such violations involve

<sup>28</sup>*In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. 268, 420, 433 (1987) (Appendix A at 192-93, 210-11), *aff'd*, 841 F.2d 1451 (9th Cir. 1988); *Midwest Farmers, Inc. v. United States*, 68 F. Supp. 91, 94-103 (D. Minn. 1945) (3-judge court); *In re Welch*, 45 Agric. Dec. 1932, 1949-51 (1986); *In re Saylor*, 44 Agric. Dec. 2238, 2295 (1985) (decision on remand); *In re Burns*, 6 Agric. Dec. 1742, 1744, 1751-54 (1982), *aff'd in part & rev'd in part*, 754 F.2d 804 (9th Cir. 1984); *In re Sterling Cattle Co.*, 39 Agric. Dec. 184, 211-12 (1980), *appeal dismissed*, No. 80-121 (10th Cir. Aug. 11, 1980); *In re Collier*, 38 Agric. Dec. 957 (1979), *aff'd per curiam*, 624 F.2d 17 (9th Cir. 1980) (unpublished); *In re Our 2. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 834, 835 (1979).

breaches of fiduciary duty by an agent to his principal and by a joint account partner to his joint venturer. The relationship of respondent to the shippers here was one of trust and confidence calling for a high degree of care, honesty and loyalty to the consignors and joint venturers.

Respondent's violations are somewhat similar, but even more flagrant, than the violations in *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand), in which an 8-month suspension order and a \$10,000 civil penalty were imposed for 14 violations in which respondent cheated principals and purchasers out of about \$10,000 (almost all by weight increases). Here we have 17 violations cheating principals out of about \$14,000. Moreover, in *Saylor*, only three of the violations involved a breach of fiduciary obligations, whereas here, all 17 violations involve a breach of fiduciary obligations.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, e.g., *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 435-62 (1967), *aff'd*, 841 F.2d 1451 (9th Cir. 1988) (Appendix A at 213-51).<sup>21</sup>

It should be noted that significant changes were made in the Department's sanction policy following (and as a result of) the holding in *Farrow v. USDA*, 760 F.2d 211 (8th Cir. 1985). The legislative history of the Act and the material relevant to the *Farrow* decision are set forth in *Spencer*, 46 Agric. Dec. at 424-31, 455-62; Appendix A at 198-208, 242-51).

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, e.g., *In re Great American Veal, Inc.*, 48 Agric. Dec. \_\_\_\_ (Jan. 19, 1989) (\$129,000

<sup>21</sup>Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, e.g., in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-L&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muchlenhauer*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordale Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Casanero*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Martin Traganth Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 535-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

civil penalty for failing to pay for livestock, operating while insolvent under preference to a creditor, and taking over another packer's inventory without paying the packer's creditors); *In re Tiemann*, 47 Agric. D. (Oct. 20, 1988) (5-year suspension for failure to pay \$27,000 for live be terminated after 180 days if full payment made); *In re Nuy Livestock Market, Inc.*, 46 Agric. Dec. \_\_\_\_ (Aug. 13, 1987) (1-year suspension for custodial account violations and various fraudulent activities); *Parchman*, 46 Agric. Dec. \_\_\_\_ (May 28, 1987) (90-day suspension and civil penalty for weighing violations), *aff'd*, 852 F.2d 858 (6th Cir. 1988); *Rotches Pork Packers, Inc.*, 46 Agric. Dec. 573 (1987) (\$50,000 civil penalty for failing to pay for meat products); *In re Spencer Livestock Commission*, 46 Agric. Dec. 268 (1987) (10-year suspension and \$30,000 civil penalty for increasing prices and weights in commission purchases), *aff'd*, 841 F.2d 1029 (9th Cir. 1988); *In re Welch*, 45 Agric. Dec. 1932 (1986) (decision by Benson) (\$10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act for fraud by an auction market employee); *Garver*, 45 Agric. Dec. 1090 (1986) (2-year suspension for failing to pay for livestock), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988); *re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986) (\$50,000 civil penalty for commercial bribery), *remanded*, 820 F.2d 1103 (9th Cir. 1987); *re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986) (\$50,000 civil penalty for commercial bribery); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590 (1986) (6-month suspension for custodial account and check violations), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Merchants Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (decision as to Mill (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year, for check-kiting, custodial account and check violations, and purchasing livestock for speculation out of commission); *re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand) (1-year suspension and \$10,000 civil penalty for fraudulent sales and purchases); *ITT Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final consent*; *re ITT*, 44 Agric. Dec. 1971 (1985) (\$10,000 civil penalty for discriminatory promotional allowances); *In re Powell*, 46 Agric. Dec. 49 (1985) (1-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. D. 1124 (1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 44 Agric. Dec. 1124 (1984) (\$77,000 civil penalty, with \$27,000 suspended, for false bond and trust violations); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year suspension for payment violations), *dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Petermann*, 42 Agric. Dec. 1848 (1983) (\$20,000 civil penalty for bait-and-switch advertising and sales practices), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

In the present case, I infer, as did the ALJ, that respondent deliberately and calculatingly increased his profits at the expense of his customers. Therefore, his violations were not more technical than real. I infer that respondent knew exactly what he was doing when he showed a commission to his customers, confirming their view that he was buying

ission typically charged by other market agencies buying on commission (time, *see Spencer*, 46 Agric. Dec. at 404-05; Appendix A at 171-74.) However, even if respondent was ignorant of the law with respect to his actions, it has never been the policy of this Department to limit severe sanctions to the case of intentional violations, or to violations done with edge of their unlawfulness. *See, e.g., In re Worsley*, 33 Agric. Dec. 1547, 71 (1974). I do not recall any contested case where a respondent has testified that he knew that he was violating the law. Frequently, I infer that his conduct was intentional and done with knowledge of unlawfulness (it is done for the benefit of reviewing judges who may dislike my hard-sanction policy), but the sanction would be the same irrespective of circumstances. *See In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). *In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1891 and n. 15 (1984), it is noted that "ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act" because:

If ignorance of the law were a mitigating circumstance, it would be a disincentive to licensees becoming familiar with the regulatory requirements under the Act, which would tend to thwart the purpose of this remedial legislation.

Respondent argues that he gave good value to his customers, and that they were generally satisfied with the transactions. However, those facts, if true, are irrelevant in determining the sanction.<sup>21</sup> As stated in *Spencer* (46 Agric. Dec. at 422-24; Appendix A at 195-98):

Respondents contend that the net price or cost of the cattle to Chaake, Monson and Van de Graaf was, in each transaction, significantly below the then prevailing market (Appeal Brief at 40). Even if true,<sup>22</sup> that fact would be irrelevant. An agent who secretly

<sup>21</sup>Complainant correctly did not bother to refute respondents' evidence that the net cost to the principals was below the prevailing market. However, the best way to determine the fair market value of the livestock is to add respondents' costs (respondent presumably paid fair market value for the cattle in Canada), respondents' expenses (all of respondents' expenses were accepted by complainant as proper), and respondents' 50¢ per cwt commission (50¢ per cwt was the maximum rate for similar services, § II(A)(1), II(B)(1), II(C)(1), *supra*). Respondents charged \$34,649.64 more than that in the 17 transactions

<sup>22</sup>*In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. 268, 424, 452 (1987) (Appendix A at 18, 237), *aff'd*, 841 F.2d 1451 (9th Cir. 1988); *In re Saylor*, 44 Agric. Dec. 2238, 2395-96, 2643 (1) (Final decision on remand); *In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1892-93 (1984); *Peterson*, 42 Agric. Dec. 1848, 1868 (1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985). As stated

at issue here, and billed the principals for 8,131 pounds of extra weight (see the table).

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increases the weights and prices of livestock purchased on a commission basis for principals commits very serious violations of the Act even if the invoice prices to the principals are at or below the market. By way of analogy, a lawyer who consistently embezzles funds from estates he is handling (in amounts over twice as great as the fees he is charging) commits serious violations of the Code of Ethics warranting disbarment even if his total compensation (consisting of fees and embezzled funds) is less than prevailing legal charges in the area.

Although the feeders felt that the livestock purchased by respondents for them was in line with the range of prevailing market prices (Tr. 257-58, 262-63, 350-52, 395-96), nonetheless, at times, they were dissatisfied with respondents' weights and prices (Tr. 233, 257-58, 298-300, 305, 397-98, 400-01, 808). [Footnote omitted.] In addition, it is very difficult even for an experienced feedlot operator to determine how particular livestock purchased for him by an agent compare with the livestock which formed the basis for market news reports. Feeder cattle are not homogenous animals. Notwithstanding the best efforts of the Department to describe feeder livestock, the descriptive system is far from perfect, making it impossible even for an experienced feedlot operator to compare in a precise manner the prices of livestock purchased for him and those described in market news reports (D. Petritz, S. Erickson, & J. Armstrong, *The Cattle and Beef Industry in the United States: Buying, Selling, Pricing* 80-85, 95-103, 416-17 (Cooperative Extension Service Paper 93, July 1982)).

Moreover, the feeders testified that respondents were buying the livestock involved here on a 50¢ per cwt commission basis, and that they expected respondents' invoices to be based on respondents' purchase weights and prices (§ II, *supra*). Hence respondents' arbitrary increases in prices and weights in the 17 transactions found here violated the express agreements between the parties, and also violated respondents' fiduciary duty to their principals. Respondent Donaldson admitted that "any individual, myself included," wants to buy livestock as cheaply as he can . . . .

The desire of the feeders to buy livestock as cheaply as they could is not inconsistent with their testimony that they were primarily interested in the cost of the cattle delivered to them in the feedlots. Furthermore, even if the three feeders had been entirely satisfied with respondents' fraudulent activities, that would not have reduced the sanction here. As stated in *In re Saylor*, 44 Agric. Dec. [2238, 2643 (1985)] (decision on remand):



But even if respondent's customers had remained satisfied if they had known all of the relevant facts, it is well settled under this Department's sanction policy that the sanction would not be reduced for that reason. See *In re Steinberg Bros. Co.*, 43 Agric. Dec. [1878, 1892-93 (1984)]; *In re Bosma*, 41 Agric. Dec. 1742, 1754 (1982) (satisfaction of farmers for whom auction market sold livestock did not negate a violation of Packers and Stockyards Act and regulations by auction market), *aff'd in part and rev'd in part on other grounds*, 754 F.2d 804 (9th Cir. 1984); *In re Louvier*, 19 Agric. Dec. 1427, 1439 (1960) ("It is not a defense to these violations to say that respondent's principals or customers are satisfied with his services. The test is whether respondent [a livestock order buyer] complied with the act . . .").

Considering the serious nature of respondent's defrauding of principals out of \$14,000 in the 17 transactions involved here, which was more than his legitimately earned commissions, the sanction proposed by the ALJ and adopted by the ALJ is fully warranted. But, out of an abundance of caution, I am providing that the \$25,000 civil penalty, held in abeyance on condition that respondent does not violate this order for 5 years, be payable (in case of a future violation) over a period of 5 years. See, *in re Spencer Livestock Commission Co.*, 46 Agric. Dec. at 464 (Appendix 253); *In re Welch*, 45 Agric. Dec. 1932, 1955 (1986) (\$10,000 payable over 5 years); and *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124, 1155-56 (1984) (\$50,000 payable over 6 years).

For the foregoing reasons, the following Order should be issued.

### Order

Respondent Jeffrey C. Ferguson, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Billing purchasers of livestock, or causing such persons to be billed, on the basis of prices, expenses and other charges in connection with livestock transactions other than those agreed upon in the sales agreement between the parties;

2. Making or causing to be made false or incorrect billings, invoices or other documents in connection with livestock purchases or sales transactions; and collecting for livestock, or causing other persons to collect or pay for livestock, on the basis of prices, expenses and other charges in connection with livestock transactions other than those agreed upon in the sales agreement between the parties.

Respondent shall prepare and keep accounts, records and memoranda which fully and correctly disclose all transactions involved in respondent's business subject to the Act, including invoices and billings which disclose, fully and correctly, all information relating to the purchase and sale of livestock.

Respondent is suspended as a registrant under the Act for a period of months.

Respondent is hereby assessed civil penalties totaling \$25,000: *Provided, however*, That all of such civil penalties shall be suspended provided the respondent shall not violate any provisions of this order for a period of 5 years from the date of service of this order on respondent. The civil penalties shall not be construed as an agreed sanction for future violations of the Act or the Order. If respondent is found, after hearing, to have violated this Order within 5 years, the civil penalties shall be paid over a 5-year period (5 monthly payments of \$416.67, and the last monthly payment of \$416.47), with the first monthly payment due on the first day of the month following the determination of respondent's violation, and each payment thereafter due on the first day of the applicable month. The civil penalties are to be paid by checks made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250-1400. If complainant advises respondent that any check was returned unpaid because of insufficient funds or any other reason, all future monthly payments shall be by certified checks.

The cease and desist and recordkeeping provisions of this Order shall become effective on the day after service of this Order.

The suspension provisions shall become effective on the 30th day after service of this Order on respondent: *Provided, however*, That if by any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or the part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto, or (ii) upon a showing made to the complainant that it is not likely that such an order will be entered by a court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

#### APPENDIX A

*In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

#### APPENDIX B

Excerpt from *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975).

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**JEFFREY C. FERGUSON.**

Docket No. 6826.

• Denying Petition for Reconsideration filed May 9, 1989.

R. Kahan, for Complainant.

• D. Elftink, for Respondent.

*Denying Petition for Reconsideration issued by Donald A. Campbell, Judicial Officer.*

Respondent's Petition for Reconsideration is denied for the reasons  
previously set forth in the Decision and Order filed March 1, 1989.

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**JEFFREY C. FERGUSON.**

Docket No. 6826.

Order filed June 19, 1989.

R. Kahan, for Complainant.

• D. Elftink, for Respondent.

*Order issued by Donald A. Campbell, Judicial Officer.*

The civil penalty and suspension provisions of the order previously issued  
in this case are hereby stayed pending the outcome of proceedings for judicial  
review.

The cease and desist and recordkeeping provisions shall remain in effect.

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**FLOYD STANLEY WHITE.**

Docket No. 6472.

Approval of Stay Order filed March 2, 1989.

E. Bruner, for Complainant.

Id R. Wellford, for Respondent.

*Approval of Stay Order issued by Donald A. Campbell, Judicial Officer.*

The stay order previously issued in this proceeding pending the outcome  
of proceedings for judicial review is hereby lifted.

The first third of the civil penalty shall be paid not later than the 90th day  
of service of this order on respondent.

The suspension provisions shall become effective on the 30th day after  
issuance of this order on respondent.

In re: FINGER LAKES LIVESTOCK EXCHANGE, INC., RONALD L. PARKER, and BARBARA PARKER.

P&S Docket No. 6793.

Decision and Order filed March 14, 1989.

Judicial Officer affirmed Administrative Law Judge - Test for insolvency - Willfulness - Sanction policy explained.

The Judicial Officer affirmed Judge Bernstein's order requiring respondents to cease and desist from various custodial account violations, including failing to deposit to their Custodial Account for Shippers' Proceeds, within the time prescribed, amounts equal to the proceeds receivable from the sale of consigned livestock, and engaging in business subject to the Act while their current liabilities exceed their current assets. The ALJ's order also suspends respondents under the Act for 21 days, and thereafter until Finger Lakes Livestock Exchange, Inc., demonstrates that any deficits in its Custodial Account for Shippers' Proceeds have been eliminated, and that its current liabilities no longer exceed its current assets. The insolvency under the Act is whether current liabilities exceed current assets. Failure to maintain a custodial account in accordance with the regulations violates the Act, irrespective of whether any consignor went unpaid. Willfulness defined. P&S regulations were not held to be substantively until the Federal Trade Commission's regulations were held to be substantively in 1973. It is immaterial that custodial account shortages resulted from buyers failing to pay for livestock promptly for livestock. Severe sanction policy explained. Ignorance of the law is not an exonerating circumstance. The civil penalty criteria in 7 U.S.C. § 213(b) are not determinative of suspensions. Complainant is not estopped because of complainant's failure to bring this action or complainant's failure to seek a temporary restraining order.

Peter V. Train, for Complainant.

Daniel W. Olsen, for Respondents.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).<sup>1</sup> A Decision and Order was filed on August 4, 1988, by Administrative Law Judge Edwin S. Bernstein (ALJ) ordering respondents to cease and desist from various custodial account violations, including failing to deposit to their Custodial Account for Shippers' Proceeds, within the time prescribed, amounts equal to the proceeds receivable from the sale of consigned livestock, and engaging in business subject to the Act while their current liabilities exceed their current assets. The ALJ's order also suspends respondents as required under the Act for 21 days, and thereafter until Finger Lakes Livestock Exchange, Inc., demonstrates that any deficits in its Custodial Account for Shippers' Proceeds have been eliminated, and that its current liabilities no longer exceed its current assets.

On September 8, 1988, respondents appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide

partment's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>2</sup> case was referred to the Judicial Officer for decision on October 6, 1988, based upon a careful consideration of the entire record, the initial decision and Order is adopted as the final Decision and Order in this case, with a few trivial changes. Additional conclusions by the Judicial Officer are consistent with the ALJ's conclusions.

### ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This administrative proceeding under the Packers and Stockyards Act, 1921, amended and supplemented (7 U.S.C. § 181 *et seq.*), ("the Act"), was initiated by a complaint filed on November 19, 1986. An Amended Complaint was filed on March 25, 1987.

The Amended Complaint alleged that Finger Lakes Livestock Exchange, ("Finger Lakes") under the direction, management and control of Ronald and Barbara Parker, (the "individual respondents") wilfully violated section 2(a) of the Act (7 U.S.C. § 213(a)) in that, between October 31, 1984, and August 31, 1985, respondents operated subject to the Act although Finger Lakes' current liabilities exceeded its current assets. The complaint also alleged that respondents wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Act's regulations (9 C.F.R. § 201.42), in that Finger Lakes, under the direction, management and control of Ronald and Barbara Parker, failed to properly maintain and use its Custodial Account for Shippers' Proceeds (the "custodial account"), thereby failing to keep accurate and prompt accounting, and payments due to owners and consignors of livestock. The Amended Complaint alleged that on August 31, 1985, September 30, 1985, and October 24, 1985, the outstanding checks drawn on the custodial account exceeded funds currently available to pay these checks, resulting in deficiencies in funds available to pay monies owed to stock consignors. The Amended Complaint further alleged that respondents violated section 312(a) of the Act (7 U.S.C. § 213(a)) by using the stock custodial account to pay the net proceeds from the sale, on a commission basis, of various items of farm equipment and machinery.

Respondents filed an answer to the complaint on December 17, 1986, and an answer to the Amended Complaint on April 7, 1987, which denied the substantive allegations of the Complaint and Amended Complaint.

I held a hearing in Rochester, New York. The parties filed proposed findings of fact, proposed conclusions of law and briefs. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

<sup>2</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 C.F.R. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in May 1971, having been involved with the Department's regulatory programs since 1949 including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program (December 1962-January 1971).

## Findings of Fact

1. Finger Lakes Livestock Exchange, Inc., is a corporation organized existing under the laws of the State of New York. Its principal place of business is Canandaigua, New York. Its mailing address is P.O. Box 696, Canandaigua, New York 14424. (CX 1; Amended Answer)

2. Finger Lakes is, and, at all times material, was:

(a) Engaged in the business of conducting and operating Finger Lakes Livestock Exchange, Inc. stockyard, a posted stockyard under the Act;

(b) Engaged in the business of buying and selling livestock in commerce on a commission basis for the accounts of others, and for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency buying and selling livestock in commerce on a commission basis and as a dealer buying and selling livestock in commerce for its own account or the accounts of others. (CX 1; Amended Answer)

3. Ronald E. Parker is an individual whose business mailing address is P.O. Box 696, Canandaigua, New York 14424. (CX 1; Amended Answer) At all times material, he was:

(a) President of the corporate Respondent;

(b) In combination with his wife, Barbara J. Parker, owner 100% of the outstanding stock of the corporate respondent; and

(c) In conjunction with Barbara J. Parker, responsible for the direction, management and control of the corporate respondent. (CX 1; Amended Answer)

4. Barbara J. Parker is an individual whose business mailing address is P.O. Box 696, Canandaigua, New York 14424. (CX 1; Amended Answer) At all times material, she was:

(a) Secretary of the corporate respondent;

(b) In combination with her husband, Ronald Parker, owner 100% of the outstanding stock of the corporate respondent; and

(c) In conjunction with Ronald Parker, responsible for the direction, management and control of the corporate respondent. (CX 1; Amended Answer)

Certified letters were sent to respondents on three separate occasions informing them that reports they had submitted to the Packers and Stockyards Administration showed that Finger Lakes' current liabilities exceeded its net assets. Each letter informed respondents that "[a] registrant is deemed to be engaging in an unfair practice if he operates while his current liabilities exceed his current assets, or if he is unable to meet his obligations as they become due in the normal course of business" [emphasis in original]. The letters were dated November 1, 1984, December 5, 1984, and August 26, 1985. (CX 3-5)

During the last week of October 1985, Reuben Johnson, then Regional Supervisor of the Lancaster, Pennsylvania Regional Office of the Packers and Stockyards Administration, assisted by Michael Pickett, conducted a review of Finger Lakes' business to determine whether Finger Lakes was solvent and to determine the status of its custodial account for shippers' proceeds. (TR 13)

1. On October 31, 1984, Finger Lakes' current liabilities exceeded its net assets by \$49,923.26. It had current liabilities of \$70,151.69 and current assets of \$20,228.43. (CX 7, 6)

2. On December 31, 1984, Finger Lakes' current liabilities exceeded its net assets by \$75,628.37. It had current liabilities of \$84,971.76 and current assets of \$9,343.39. (CX 9, 6)

3. On August 31, 1985, Finger Lakes' current liabilities exceeded its current assets by \$75,542.57. It had current liabilities of \$88,042.57 and current assets of \$12,499.00. (CX 11, 6)

4. From October 31, 1984, through August 31, 1985, Finger Lakes conducted weekly auction sales. (TR 60)

5. On December 31, 1987, Finger Lakes' current assets exceeded its current liabilities by \$527.00. It had current assets of approximately \$31,623.00 and current liabilities of approximately \$31,096.00. (CX 18; TR 85-102)

6. As of October 31, 1984, Finger Lakes had outstanding checks drawn on its custodial account of at least \$187,865.85, and had, to offset this amount, cash in its custodial account of \$21,980.13, deposits in transit of \$31,800.36, cash on hand of \$14,380.50 and current proceeds receivable of \$104,175.45. As a result, Finger Lakes had a deficiency of at least \$15,529.41 in funds available to pay shippers' proceeds. (CX 8; TR 20-33)

7. On December 31, 1984, Finger Lakes had outstanding checks drawn on its custodial account of at least \$104,793.88, and had, to offset this amount, cash in its custodial account of \$70,452.65 and current proceeds receivable of \$16,247.47. As a result, Finger Lakes had a deficiency of at least \$13,278.76 in funds available to pay shippers' proceeds. (CX 10; TR 38-44)

8. On August 31, 1985, Finger Lakes had outstanding checks drawn on its custodial account of at least \$106,395.46 and expense items incident to sales of \$158.97, and had, to offset these amounts, cash in its custodial account of \$153.28 and current proceeds receivable of \$75,108.58. As a result, Finger Lakes had a deficiency of at least \$27,692.57 in funds available to pay shippers' proceeds. (CX 12; TR 45-59)

9. On September 30, 1985, Finger Lakes had outstanding checks drawn on its custodial account of at least \$97,360.31, and had, to offset this amount, cash in its custodial account of \$52,711.22, a deposit in transit of \$8,877.34, and

current proceeds receivable of \$13,911.83. As a result, Finger Lakes had deficiency of at least \$21,858.92 in funds available to pay shippers' proceeds (CX 14; TR 63-70)

16. On October 24, 1985, Finger Lakes had outstanding checks drawn on its custodial account of at least \$185,246.70, and had, to offset this amount cash in its custodial account of \$65,520.95 and current proceeds receivable of \$100,548.38. As a result, Finger Lakes had a deficiency of at least \$9,177.37 in funds available to pay shippers' proceeds. (CX 15; TR 70-75)

17. Although Barbara Parker's reconciliations of the custodial account showed shortages, respondents submitted reports to the Packers and Stockyards Administration showing overages in the account or that the account was in balance. (CX 7 and 8, p. 25; CX 9 and 10, p. 19; CX 11 at 12, p. 20; TR 28, 40-43, 57-58)

18. On December 31, 1987, Finger Lakes had outstanding checks drawn on its custodial account of \$249,850.57, and had to offset this amount, cash in its custodial account of \$95,143.28 and current proceeds receivable in the amount of \$157,285.63. This resulted in an excess of funds available to cover the outstanding checks in the amount of \$2,578.34. However, on January 5, 1988, Finger Lakes issued a custodial account check to itself of \$7,616.57 for commission and other marketing charges it had earned at the sales on December 23 and 30, 1987. This caused a deficiency in the account of \$5,038.17 as of January 5, 1988. (CX 19; TR 90-99)

19. There was no evidence submitted as to Finger Lakes' current assets or its current liabilities, or the status of its custodial account as of the date of the hearing.

20. Respondents sold farm equipment and other items on a commission basis and issued checks for the net proceeds from their livestock custodial account. (CX 17; TR 77-78)

### Conclusions of Law

Respondents willfully violated the Act by operating as a market agency while Finger Lakes' current liabilities exceeded its current assets during the period from October 31, 1984, through August 31, 1985. Respondents' own figures demonstrate that Finger Lakes' current liabilities exceeded its current assets during this time period. Respondents do not challenge these figures. Their defense is predicated upon a challenge to the test used by complainant to determine insolvency.

There is no definition of insolvency in the Act. However, in the regulations, the Secretary of Agriculture has adopted the test of insolvency as being whether current liabilities exceed current assets. If a registrant's current liabilities exceed its current assets, it is deemed to be insolvent. (9 C.F.R. 203.10). Section 203.10 states:



§ 203.10 Statement with respect to insolvency; definition of current assets and current liabilities.

(a) Under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), the principal test of insolvency is to determine whether a person's current liabilities exceed his current assets. This current ratio test of insolvency under the Act has been reviewed and affirmed by a United States Court of Appeals. *Bowman v. U.S. Department of Agriculture*, 363 F.2d 81 (5th Cir. 1966).

(b) For the purposes of the administration of the Packers and Stockyards Act, 1921, the following terms shall be construed, respectively, to mean:

(1) "Current assets" means cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business, which is considered to be one year.

(2) "Current liabilities" means obligations whose liquidation is reasonably expected to require the use of existing resources principally classifiable as current assets or the creation of other current liabilities during the one year operating cycle of the business.

(c) The term current assets generally includes: (1) cash in bank or on hand; (2) sums due a market agency from a custodial account for shippers' proceeds; (3) accounts receivable, if collectable; (4) notes receivable and portions of long-term notes receivable within one year from date of balance sheet, if collectable; (5) inventories of livestock acquired for purposes of resale or for purposes of market support; (6) feed inventories and other inventories which are intended to be sold or consumed in the normal operating cycle of the business; (7) accounts due from employees, if collectable; (8) accounts due from officers of a corporation, if collectable; (9) accounts due from affiliates and subsidiaries of corporations if the financial position of such subsidiaries and affiliates justifies such classification; (10) marketable securities representing cash available for current operations and not otherwise pledged as security; (11) accrued interest receivable; and (12) prepaid expenses.

(d) The term current assets generally excludes: (1) Cash and claims to cash which are restricted as to withdrawal, such as custodial funds for shippers' proceeds and current proceeds receivable from the sale of livestock sold on a commission basis; (2) investments in securities (whether marketable or not) or advances which have been made for the purposes of control, affiliation, or other continuing business

advantage; (3) receivables which are not expected to be collected within 12 months; (4) cash surrender value of life insurance policies; (5) and other natural resources; and (6) depreciable assets.

(c) The term current liabilities generally includes: (1) B overdrafts (per books); (2) amounts due a custodial account shippers' proceeds; (3) accounts payable within one year from date of balance sheet; (4) notes payable or portions thereof due and payable within one year from date of balance sheet; (5) accruals such as wages, social security, unemployment compensation, etc., due payable as of the date of balance sheet; and (6) all other liabilities whose regular and ordinary liquidation is expected to occur within one year.

As complainant concedes, there are other tests for insolvency. However, the ratio of current assets to current liabilities is a proper test when applied to the livestock industry. As Merle Paulsen, Branch Chief of the Financial Protection Branch, Packers and Stockyards Administration testified, the livestock industry is a cash basis industry. Section 409 of the Act (7 U.S.C. 228b) requires purchasers of livestock to pay for their purchases by the close of the next business day. Similarly, under section 201.43 of the regulation (C.F.R. § 201.43), a market agency selling livestock on a commission basis to respondents, must forward the proceeds of the sale to the respondents by the close of the next business day. Thus, the ratio of current assets to current liabilities is a significant indication of one's ability to pay on a cash basis. (TR 122)

In *Bowman v. U.S. Department of Agriculture, et al.*, 363 F.2d 81, 5th Cir. 1966), the Fifth Circuit, in approving the Secretary's test, stated:

"Having in mind the remedial purposes of the Act, we hold that the test used for determining solvency or insolvency under the circumstances here was reasonable. A financial status where current assets exceed current liabilities would be the *sine qua non* of prompt payment."

The Ninth Circuit Court of Appeals has also approved and adopted the test of insolvency. In *Blackfoot Livestock Commission Company v. Department of Agriculture*, 810 F.2d 916, 921 (9th Cir. 1987), the Court stated:

The Act prohibits operating a stockyard while insolvent. 7 U.S.C. § 204; *Bowman v. United States Dept. of Agriculture*, 363 F.2d 81 (5th Cir. 1966). Insolvency is defined as current liabilities exceeding current assets. *Bowman*, 363 F.2d at 84-85. The Secretary defines current assets and current liabilities by regulation. 9 C.F.R. § 203.10(b) (1982) (assets); 9 C.F.R. § 203.10(b)(2) (1982) (liabilities).

Respondents' accountant, Mr. Ronald Parrish, testified that he was not persuaded by this test. (TR 218) Mr. Parrish defined insolvency as "the condition where the total liabilities exceed the total assets."

meet one's debts as they mature" (TR 220) and concluded that, accordingly, Finger Lakes was solvent. (TR 253)

Dr. Parrish explained that since "[t]he Exchange has always been able to [pay] its debts when due, so therefore by default, it was not insolvent, even though it had a negative working capital position." (TR 231)

However, the American Institute of Certified Public Accountants (AICPA), "CPA Letter," has recently stated:

... CPAs are precluded from providing any form of assurance on any financial presentation of matters relating to solvency.

Providing such assurance is precluded because these matters are legal concepts subject to legal definition and varying legal interpretation that are not clearly defined in a legal or accounting sense. Consequently, they do not provide the CPA with the reasonable criteria required to evaluate assertions about solvency under the third general attestation standard.

(20, p. 3; *The CPA Letter*, Vol. 68, No. 3, February 29, 1988).

Furthermore, that no consignors have, in fact, been unpaid is not a defense.

The argument that there is no evidence of any particular shipper not being paid is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipency. Proof of a particular injury is not required. *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 152, 62 S. Ct. 966, 86 L. Ed. 1336; *Fashion Originators Guild of America v. Federal Trade Commission*, 312 U.S. 457, 466, 668, 61 S. Ct. 703, 85 L. Ed. 949.

*re Bowman and Reynolds*, 23 Agric. Dec. 1065, at 1071, quoting *Harry C. Daniels, d/b/a Harry C. Daniels and Co. v. United States*, 242 F.2d 39, 41-42 (9th Cir. 1957), cert. denied, 345 U.S. 939 (1957). See also: *In re Paul Rodman and David Rodman*, P. & S. Docket No. 6607 (May 27, 1988)

Additionally, respondents wilfully violated the Act by failing to maintain and use properly Finger Lakes' Custodial account.

Every market agency subject to the Packers and Stockyards Act is required to establish and properly maintain a Custodial Account for Shippers' Proceeds (9 C.F.R. § 201.42(b)). Section 201.42(c) of the regulations (9 C.F.R. § 201.42(c)), in effect at the time of the alleged violations, gives detailed instructions on how to properly maintain a custodial account. It states:

(c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of

livestock that are due from (i) the market agency, (ii) any officer, or employee of the market agency [, and (iii) any to whom the market agency] has extended credit. The market shall thereafter deposit in the custodial account all proceeds until the account has been reimbursed in full, and shall, before close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether the proceeds have been collected by the market agency.

Both this Department and the courts have consistently held that of a market agency to maintain its custodial account in accordance with requirements of section 201.42 is a violation of sections 307 and 302 Act (7 U.S.C. §§ 208, 213(a)), as well as a violation of section 1 of *Blackfoot Livestock Commission Company, supra*, at 921; *In re Mu Livestock Market, Inc.*, and *Carlton Reeves*, 46 Agric. Dec. \_\_\_\_ (Aug. 1968); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 301-02, 301-11 (1968), 582 F.2d 39 (5th Cir. 1978); *In re Breckenridge Auction & Sale*, 46 Agric. Dec. 1522 (1977); *In re Hardy*, 33 Agric. Dec. 1383, 1398-1400 (1964), 533 F.2d 1088 (5th Cir. 1974), *aff'd sub nom.*, *Miller v. U.S. Department of Agriculture*, 533 F.2d 1088 (5th Cir. 1974); *In re Lufkin Livestock Exchange, Inc.*, 27 A 596, 605-10 (1968); *In re Anderson*, 26 Agric. Dec. 615, 619-20 (1964), 508 F.2d 1086-89 (1964), *aff'd sub nom.*, *Bowman v. U.S. Department of Agriculture*, 508 F.2d 81 (5th Cir. 1966); *In re Bowman and Reynolds*, 23 Agric. Dec. 71 (1964); *In re Daniels*, 14 Agric. Dec. 903, 913-17 (1955), *aff'd*, *United States*, 242 F.2d 39 (7th Cir. 1957), *cert. denied*, 345 U.S. 939. A market fails to handle its custodial account in accordance with § 201.42 if it is both unfair and deceptive. "It is deceptive because shippers know that their money is being used to extend credit to buyers [or to itself]. It is unfair because it is using trust money for their own purpose to extend credit to themselves and others." *In re Hardy, supra*, at 1400. *Blackfoot Livestock Co.*, 45 Agric. Dec. 590, at 600-05.

Reuben Johnson, who conducted the analysis of Respondents' account for complainant, testified as to the results of his audit and as to the accuracy and source of each of his figures. Mr. Johnson gave the benefit of a doubt by excluding approximately \$600 which he listed as outstanding checks but which he could not verify. This demonstrated how Barbara Parker's reconciliations of the custodial account did not significantly differ from his analysis. Mr. Johnson's analysis showed that there was a deficiency in funds available to pay shippers their proceeds on the following dates: October 31, 1984, December 31, 1984, August 31, 1985, September 30, 1985, October 24, 1985, and January 5, 1986. (CX 8, 15, 19)

Respondents did not challenge Mr. Johnson's analyses, but argued that there was no violation because no consignor went unpaid. The argument that checks being returned for insufficient funds is not a defense. See *Blackfoot Livestock Commission Company*, 45 Agric. Dec. 590, 600-05.

*U.S., supra; In re Bowman and Reynolds, supra, In re Paul Rodman and Avid Rodman, supra.*

Furthermore, these shortages do not appear to be inadvertent. On several occasions, Barbara Parker submitted reports to the Packers and Stockyards Administration indicating that there was an overage in the account or that the account was in balance when, in fact, there was a shortage. (CX 7, 9 and 11 compared with CX 8, 10 and 12, respectively) Mrs. Parker submitted these reports even though her own reconciliations showed the shortage. Mrs. Parker conceded at trial that she did not know how she arrived at the figures shown in the reports in light of her reconciliations. (TR 208-09)

Similarly, in the custodial account analysis as of December 31, 1987, the retention of commissions earned in the account resulted in no shortage in the account on that date. Yet, five days later, respondents issued a custodial account check to themselves in the amount of \$7,626.51, which caused a shortage of \$5,038.67 as of January 5, 1988. Furthermore, respondents issued checks drawn on their custodial account to pay the net proceeds for the sale of farm equipment and other machinery in violation of section 201.42 of the regulations (9 C.F.R. § 201.42).

It is, therefore, clear that respondents have wilfully allowed deficiencies to exist in Finger Lakes' custodial account in violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 C.F.R. § 201.42).

I further conclude that . . . respondents' violations were wilful, serious violations of the Act. A violation is *wilful* for administrative law purposes if respondent intentionally does an act which is prohibited, regardless of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. *Townsend v. United States*, 95 F.2d 352, 357-8 (DC Cir. 1938), *cert. denied*, 303 U.S. 664 (1938); *Goodman v. Benson*, 286 F.2d 96, 900 (7th Cir. 1961); *Butz v. Glover Livestock*, 411 U.S. 182, 185 (1973); *Hilverman v. CFTC*, 549 F.2d 29, 31 (7th Cir. 1977); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 97.

Mr. Merle Paulsen testified as to the recommended sanction of the Packers and Stockyards Administration and its basis. Mr. Paulsen, the Branch Chief of the Financial Protection Branch, is responsible for the monitoring of the financial condition of over 8,000 registrants. He recommended a cease and desist order and a suspension of respondents' registration for 21 days, and hereafter until the firm demonstrated that it is no longer insolvent and that the deficit in its custodial account had been eliminated. (TR 127)

Mr. Paulsen noted that three letters had been previously sent to respondents notifying them that it was a violation to operate while current liabilities exceeded current assets but that these attempts to achieve voluntary compliance had been ignored. (TR 128) It was only shortly before the trial that respondents became solvent. Mr. Paulsen also emphasized respondents' submission of erroneous information concerning the status of the custodial account. (TR 128)

Livestock consignors are entitled to rely on the fact that the custodial account will be maintained so that their checks will clear. They are entitled

to rely on the fact that the market is solvent and has sufficient working capital that the market can pay them promptly in the event that the purchasers or their livestock fail to pay. This is a fiduciary obligation which the market has voluntarily undertaken and one which it must always be in a position to satisfy.

A suspension period of 21 days is consistent with sanctions imposed in similar cases and is warranted. The Packers and Stockyards Administration is a relatively small agency and is unable to monitor the financial condition and trade practices of each registrant on a daily basis. Where violations are found, sanctions must be sufficiently severe to deter respondents and others from violating the Act. *In re Miller*, 33 Agric. Dec. [53], 55, *aff'd sub nom. Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974). The rationale for the Department's severe sanction policy is set forth at length in numerous decisions, e.g., *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. [268, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)]; *Blackfoot*, *supra*, at 922, and *In re Murfreesboro Livestock Market, Inc., and Carlton Reeves*, 46 Agric. Dec. \_\_\_, at 33-36 (1987).

It is also common in cases where respondents have been found to be insolvent or to have a shortage in their custodial account to include as part of the sanction a provision suspending respondents until they demonstrate that they are solvent or that the deficit in the custodial account has been eliminated.

#### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The arguments by respondents as to the custodial account violations are the same, in many respects, as those rejected in *In re Rodman*, 47 Agric. Dec. \_\_\_, (May 27, 1988), attached as Appendix A. *Rodman* sets forth the history of the custodial account regulations from 1921 to the present (Appendix A at 13-22), and summarizes each of the eight judicial decisions from 1932 to 1987 involving custodial account violations, all of which affirmed the disciplinary order at issue in the case (Appendix A at 23-37). *Rodman* explains that proof of injury or likelihood of injury is not required in custodial account violation cases (Appendix A at 37-44), and that the 1982 custodial account regulations, at issue here, have substantive effect (Appendix A at 44-51).<sup>2</sup>

<sup>2</sup>Respondents quote a statement that I made in 1967 as Acting Administrator of the Packers and Stockyards Administration (32 Fed. Reg. 20,921 (1967)) that a "minor change . . . made in § 201.42(e)(3) from the provisions set forth in the notice of rule making . . . is for clarification of the provision and is not substantive in nature" (Respondents' Appeal Brief at 26). I was stating that the change was not substantive—not that the regulation was not substantive. The notice of proposed rule making as to the amendment makes it clear that the requirements of 201.42 are mandatory. It states (32 Fed. Reg. 9025 (1967)):

It is also proposed that § 201.42 be amended to make explicit the duties of market agencies and licensees with respect to depositing funds in custodial accounts, whether or not they elect to adopt the proposed net proceeds method.

Nonetheless, it was not until the Federal Trade Commission's regulations were held to be substantive in 1973 that the Packers and Stockyards regulations, based on the FTC statutory

(continued)

Rodman further discusses the meaning of the term willful, as used in the Administrative Procedure Act, including a discussion of *Economou v. USDA*, 494 F.2d 519 (2d Cir. 1976) (Appendix A at 51-60). The *Economou* case is also discussed at length in *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975), attached as Appendix B to this decision. (The issue as to willfulness is relevant only with respect to the custodial account violations, since three warning letters were sent to respondents as to operating with inadequate assets, stating (CX 3, p. 1; CX 4, p. 1; CX 5, p. 1) (emphasis in original of CX 3, p. 1, and CX 5, p. 1):

In the administration of the Packers and Stockyards Act, we are particularly concerned with the adequacy of capital to permit prompt payment for livestock and to meet current operating expenses. A registrant is considered to be engaging in an unfair practice if he operates while his *current liabilities exceed his current assets*, or if he is unable to meet his obligations as they become due in the normal course of business. We realize this condition may have been temporary, and that you may have corrected the situation by obtaining additional working capital, converting short-term notes to long-term obligations, or by some other means.

Respondents argue that their custodial account shortages resulted from buyers failing to pay them promptly for livestock. However, since January 1, 1968, auction market operators have been required to have sufficient capital to put their own money into the custodial account if buyers fail to pay them promptly (see *Rodman*, Appendix A at 17-22). In fact, prior to August 30, 1982, auction market operators were required to put their own money into the custodial account to cover all proceeds receivable on or before the third day following the sale of consigned livestock. Since August 30, 1982, they have 7 days in which to do so. If an auction market operator does not know that the buyer from his sale will pay promptly for livestock purchased from the sale, the operator can demand immediate payment on the day of the sale (see 7 U.S.C. § 208). Whether to trust a buyer to pay promptly is a business judgment that must be made by all auction market operators.

Respondents argue that a 21-day suspension order is too severe. But it is, in fact, quite modest, considering the serious nature of respondents' violations, and the potential for great harm to result to livestock producers as a result of such violations.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the

<sup>1</sup>(...continued)

authority incorporated by reference (7 U.S.C. § 222), were regarded as substantive, where appropriate. See Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, § 3.16 (1981 and 1988 Cum. Supp.).

Department's severe sanction policy is set forth at great length in numerous decisions, e.g., *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 424-32, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), attached Appendix C to this decision (Appendix C at 198-209, 213-51).<sup>4</sup>

It should be noted that significant changes were made in the Department's sanction policy following (and as a result of) the holding in *Farrow v. US*, 760 F.2d 211 (8th Cir. 1985). The legislative history of the Act and material relevant to the *Farrow* decision are set forth in *Spencer*, 46 Agric. Dec. at 424-31, 435-62; Appendix C at 198-208, 242-51).

In addition, the sanctions imposed under the Packers and Stockyards in recent years have been much more severe than during earlier years, e.g., *re Ferguson*, 48 Agric. Dec. \_\_\_\_ (Mar. 1, 1989) (6-month suspension \$25,000 civil penalty (held in abeyance) for increasing prices in commission transactions); *In re Great American Veal, Inc.*, 48 Agric. Dec. \_\_\_\_ (Jan. 1989) (\$129,000 civil penalty for failing to pay for livestock, operating insolvent, giving undue preference to a creditor, and taking over another packer's inventory without paying the packer's creditors), *appeal docketed*, 89-3108 (3d Cir. Feb. 22, 1989); *In re Tiemann*, 47 Agric. Dec. \_\_\_\_ (Oct. 1988) (5-year suspension for failure to pay \$27,000 for livestock, to terminated after 180 days if full payment made); *In re Mufreesboro Live Market, Inc.*, 46 Agric. Dec. \_\_\_\_ (Aug. 13, 1987) (1-year suspension custodial account violations and various fraudulent activities); *In re Parn*, 46 Agric. Dec. \_\_\_\_ (May 28, 1987) (90-day suspension and \$10,000 civil penalty for weighing violations), *aff'd*, 852 F.2d 858 (6th Cir. 1988); *In re Rotches Pork Packers, Inc.*, 46 Agric. Dec. 573 (1987) (\$50,000 civil penalty failing to pay for meat products); *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268 (1987) (10-year suspension and \$30,000 civil penalty increasing prices and weights in commission purchases), *aff'd*, 841 F.2d 1 (9th Cir. 1988); *In re Welch*, 45 Agric. Dec. 1932 (1986) (decision *re* Benson) (\$10,000 civil penalty and 1-year prohibition from engaging

<sup>4</sup>Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, e.g., in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-L&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (P. *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenholler*, 37 Agric. Dec. 313, 330-32, 337-32, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Berg*, 570 F.2d 701 (8th Cir. 1978); *In re Cordale Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (U. *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 36 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, U.S. 968 (1978); *In re Cantano*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 778, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Martin Trugash Co.*, 33 Agric. Dec. 1884, 191 (1974), *aff'd*, 524 F.2d 1235 (5th Cir. 1975); *In re Thomson Livestock, Inc.*, 33 Agric. Dec. 499, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).



business subject to the Act for fraud by an auction market employee); *In re Garver*, 45 Agric. Dec. 1090 (1986) (2-year suspension for failing to pay for livestock), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986) (\$50,000 civil penalty for commercial bribery), *remanded*, 820 F.2d 1103 (9th Cir. 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986) (\$50,000 civil penalty for commercial bribery); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590 (1986) (6-month suspension for custodial account and check-kiting violations), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (decision as to Millsbaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year, for check-kiting, custodial account and payment violations, and purchasing livestock for speculation out of consignments); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand) (8-month suspension and \$10,000 civil penalty for fraudulent sales and purchases); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final consent decision*, 44 Agric. Dec. 1971 (1985) (\$10,000 civil penalty for discriminatory promotional allowances); *In re Powell*, 46 Agric. Dec. 49 (1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. 1220 (1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984) (\$77,000 civil penalty, with \$27,000 suspended, for payment, bond and trust violations); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year suspension for payment violations), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. 1848 (1983) (\$20,000 civil penalty for bait-and-switch advertising and deceptive practices), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

Even if respondents were ignorant of the law with respect to their violations, it has never been the policy of this Department to limit severe sanctions to the case of intentional violations, or to violations done with knowledge of their unlawfulness. See, e.g., *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). I do not recall any contested case where a respondent has admitted that he knew that he was violating the law. Frequently, I infer that certain conduct was intentional and done with knowledge of unlawfulness (which is done for the benefit of reviewing judges who may dislike my hard-nosed sanction policy), but the sanction would be the same irrespective of those circumstances. See *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). In *In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1891 and n. 15 (1984), it is explained that "ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act" because:

If ignorance of the law were a mitigating circumstance, it would be a disincentive to licensees becoming familiar with the regulatory requirements under the Act, which would tend to thwart the purpose of this remedial legislation.

Respondents contend (Appeal Brief at 33-35) that the criteria in § 312(b) of the Act (7 U.S.C. § 213(b)) must be considered in determining the length

of the suspension order, but there is no merit to that argument. See *Roth* Appendix A at 65-66.

Finally, respondents argue that complainant should be estopped from bringing this action because the complaint (filed November 19, 1986) was brought until over one year from the audit (October 1985), and complainant could have sought a temporary restraining order under 7 U.S.C. § 221 if there was immediate danger (Respondents' Appeal Brief at 36). Respondents argue (Respondents' Appeal Brief at 36):

The Judicial Officer has ruled that estoppel can run against the P&S Administration. In *In re Norris* [sic], 40 A.D. 736, at 764, the JC ruled that since the agency waited a year and a half to follow up on a charge, the complainant was "estopped" from bringing the charges.

The case cited in the preceding quotation is actually *In re Unionville S Co.*, 40 Agric. Dec. 736, 764 (1979), which states:

We are constrained to note that within a short time following the investigation of May 20, 1974, the agency did not proceed to charge Mr. Norris with violations of the Act on the basis of the investigator's report for the purposes of imposing a sanction, but chose instead the alternative method of issuing a "warning letter." This was not followed up until a year and a half later. We conclude, therefore, that the agency should be, by its own deliberate action, estopped from now bringing charges relating to incidents on May 20, 1974.

However, the preceding quotation relied on by respondents is not from the Judicial Officer's decision, but, rather, is from the ALP's decision issued May 4, 1979, that was reversed by the Judicial Officer as to this point on August 22, 1979. The Judicial Officer's decision reversing this point states *re Unionville Sater Co.*, 38 Agric. Dec. 1207, 1210-11 (1979) (remand order).

The allegations of false weighing on May 20, 1974, were properly dismissed by Judge Liebert inasmuch as complainant did not object to the motion to dismiss the charges when it was shown that the respondent corporation was not formed until after the alleged violations.<sup>4</sup> However, Judge Liebert erroneously added that the

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<sup>4</sup>Complainant did not attempt to hold the respondent corporation responsible for the May 20, 1974, alleged violations under the doctrine of piercing the corporate veil and, therefore, no consideration is given as to whether the corporation could have been held responsible for the May 20, 1974, alleged violations.

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complainant should be "estopped from now bringing charges relating to incidents on May 20, 1974," because complainant had previously

issued a "warning letter" with respect to the alleged violations, which was "not followed up until a year and a half later" (Initial Decision, p. 40). This is contrary to the policy of this Department that equitable estoppel does not apply to the Government acting in its sovereign capacity. See *In re Norwich Beef Company*, 38 Agric. Dec. 380, 396-398 (1979), appeal pending; *In re M.&H. Produce Co.*, 34 Agric. Dec. 700, 760-761 (1975), affirmed on other grounds *sub nom. M.&H. Produce Co. v. Knebel*, 36 Agric. Dec. 470 (C.A.D.C.), certiorari denied, 98 Sup. Ct. 394. In addition, even if the doctrine of equitable estoppel were applicable, there would be no factual basis for estoppel in this case since respondent did not act on the warning letter to its detriment. That is, any action taken by respondent to insure accurate weighing would have been required by the Act and regulations irrespective of the warning letter.

Respondents' confusion as to this matter is understandable, since the editor of Agriculture Decisions erroneously captioned the ALJ's decision printed at 40 Agric. Dec. 736 as "Supplement to Initial Decision issued by Donald A. Campbell, Judicial Officer." Actually the first part of the document printed at 40 Agric. Dec. 736 (cited by respondents), viz., pp. 736-766, is the ALJ's initial decision issued May 4, 1979, which I reversed and remanded (38 Agric. Dec. 1207, 1210-11). The second part of the document printed at 20 Agric. Dec. 736 (cited by respondents), viz., pp. 766-770, is the ALJ's "Supplement to Initial Decision--and Amended Order Following Hearing on Demand" issued May 14, 1981, which was never appealed to the Judicial Officer (see Editor's note at 40 Agric. Dec. 770).

My view that the Government is not subject to estoppel when it is acting in its sovereign capacity was stated in *In re Norwich Beef Co.*, 38 Agric. Dec. 80, 397-98 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982), quoting from *In re M.&H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975), *aff'd on other grounds sub nom. M.&H. Produce Co. v. Knebel*, 549 F.2d 830 (D.C. Cir.) (unpublished), *reprinted in* 36 Agric. Dec. 470, *cert. denied*, 434 U.S. 920 (1977), as follows:

Even if we were to assume that the facts in this case presented a case for equitable estoppel, I adhere to the traditional view that equitable estoppel does not apply to the Government acting in its sovereign capacity.

As stated in *United States v. Georgia-Pacific Company*, 421 F.2d 92, 100-101 (C.A. 9):<sup>25</sup>

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<sup>25</sup>See also *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-386; Davis, *Administrative Law Treatise* (1958 ed. and 1970 supp.), §§ 17.01-17.04.

Numerous cases reflect the position that equitable estoppels are found against the Government in certain situations. Thus, the courts have held that an equitable estoppel may be found against the Government (1) if the Government is acting in its proprietary rather than sovereign capacity; and (2) if its representative has been acting within the scope of his authority.

(1) While it is said that the Government can be estopped in its proprietary role, but not in its sovereign role, the authorities are not clear about just what activities are encompassed by each. In its proprietary role, the Government is acting as a private concern would; in its sovereign role, the Government is carrying out its unique governmental functions for the benefit of the whole public.

Similarly, in *United States v. State of Florida*, 482 F.2d 205 (C.A. 5), the Court stated:

Whether the defense of estoppel may be asserted against the United States in actions instituted by it depends upon whether such actions arise out of transactions entered into in its proprietary capacity or contract relationships, or whether the actions arise out of the exercise of its powers of government. The United States is not subject to an estoppel which impedes the exercise of the powers of government, and is not estopped to deny the validity of a transaction or agreement which the law does not sanction. *Sanitary Dist. v. United States*, 266 U.S. 40, 45 S. Ct. 176, 69 L. Ed. 352 (1925); *Utah Power & L. Co. v. United States*, 243 U.S. 389, 37 S. Ct. 387, 61 L. Ed. 791 (1916). Nor does an estoppel arise through an act or representation made by an officer or agent without authority to act for the government in the premises. *Wilber Nat. Bank v. United States*, 294 U.S. 120, 55 S. Ct. 362, 79 L. Ed. 798 (1935); *Jeems Bay Fishing & Hunting Club v. United States*, 260 U.S. 561, 43 S. Ct. 205, 67 L. Ed. 402 (1922).

There is, however, some support for the view that in recent years "the doctrine of sovereign immunity has begun to crumble, and so the rules insulating the government from estoppel." *Gestivo v. Dir. of U.S. Immigration & Nat. Serv.*, 337 F. Supp. 1093, 1098 (C.A. 9). It has been said that estoppel now "hinges on only two considerations: estoppel is available if the government's wrong conduct threatens to work a serious injustice and if the public's interests would not be unduly damaged by the imposition of estoppel" (*id.* 1099). See, also, *United States v. Lazy FC Ranch*, 481 F.2d 985 (C.A. 9), in which the Court said that--

estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. *Gestuvo v. District Dir. of I. N. S.*, 337 F. Supp. 1093 (C.D. Cal. 1971). This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) although we may be more reluctant to estop the government when it is acting in this capacity. See *Georgia-Pacific, supra*.

I believe that the older, traditional view best protects the public interest and should be adhered to. I would deal with wrongful conduct Government employees through disciplinary actions, if their conduct warrants punishment, rather than by damaging the public interest to a degree.

affirming my decision in *Norwich*, the court stated (*Norwich Beef Co. v. United States*, No. H-79-210, slip op. at 8-9 (Feb. 6, 1981)):

st, it must be noted that when the government is processing protection service applications, it is clearly acting in its sovereign capacity. That is, it is carrying out its unique governmental functions for the benefit of the whole public. The government is not subject to estoppel when it is acting in its sovereign role. *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 100-01 (9th Cir. 1970). See also *Air-Sea Brokers, Inc. v. United States*, 596 F.2d 1008, 1011 (C.C.P.A. 1979).

it even if the government were subject to estoppel, there is no basis for denying estoppel here. The delay in initiating this case (which was, in fact, more than typical) caused no damage to respondents. And applying estoppel would damage the public interest, which requires the imposition of sanctions to deter future similar violations by respondents and others. For the foregoing reasons, the following Order should be issued.

### Order

Finger Lakes Livestock Exchange, Inc., Ronald E. Parker and Barbara J. Parker, their agents and employees, directly or through any corporate or other entity in connection with their operations subject to the Act, shall cease and desist from:

1. Engaging in business subject to the Act while their current liabilities exceed their current assets;
2. Failing to deposit in their Custodial Account for Shippers' proceeds, within the time prescribed by section 201.42 of the regulations

(9 C.F.R. § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock;

3. Using custodial funds for any purpose other than the payment to consignors of the proceeds from the sale of their livestock; and

4. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the requirements of section 201.42 of the regulations.

Finger Lakes Livestock Exchange, Inc., and Ronald E. Parker and Barbara Parker, as its *alter egos*, are suspended as registrants under the Act for a period of 21 days and thereafter until such time as Finger Lakes Livestock Exchange, Inc., demonstrates that the shortage in its custodial account has been corrected and that its current liabilities no longer exceed its current assets, whereupon a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 21-day period.

The cease and desist provisions of this Order shall become effective 60 days after service of this Order. The suspension Order shall become effective on the 30th day after service of this Order.

#### APPENDIX A

*In re Rodman*, 47 Agric. Dec. \_\_\_\_ (May 27, 1988).

#### APPENDIX B

Excerpt from *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975).

#### APPENDIX C

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 424-32, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

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**In re: FINGER LAKES LIVESTOCK EXCHANGE, INC., RONALD E. PARKER, and BARBARA PARKER.**  
P&S Docket No. 6793.

Order Denying Petition for Reconsideration filed May 17, 1989.

Peter V. Train, for Complainant.

Daniel W. Olson, for Respondents.

Order Denying Petition for Reconsideration issued by Donald A. Campbell, Judicial Officer.

Respondents' Petition for Reconsideration is denied for the reasons previously set forth in the Decision and Order filed March 14, 1989.

re: FINGER LAKES LIVESTOCK EXCHANGE, INC., RONALD E. PARKER and BARBARA PARKER.

S Docket No. 6793.

Stay Order filed June 19, 1989.

For V. Trais, for Complainant.

For W. Olsen, for Respondents.

Order issued by Donald A. Campbell, Judicial Officer.

The suspension provisions of the order previously issued in this case are hereby stayed pending the outcome of proceedings for judicial review.

The cease and desist provisions shall remain in effect.

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re: FINGER LAKES LIVESTOCK EXCHANGE, INC., RONALD E. PARKER and BARBARA PARKER.

S Docket No. 6793.

Order Lifting Stay Order filed June 30, 1989.

For V. Trais, for Complainant.

For W. Olsen, for Respondents.

For Lifting Stay Order issued by Donald A. Campbell, Judicial Officer.

Respondents have decided not to appeal the order issued in this case, and, therefore, the Stay Order is lifted. The Suspension Order shall start on July 1989.

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re: MODESTO MENDICOA and KIMBALL CALL.

S Docket No. 6796.

Decision and Order filed March 16, 1989.

Judicial Officer affirmed Administrative Law Judge--Sanction policy explained.

The Judicial Officer affirmed Judge McGrath's order requiring respondents to cease and desist from weighing livestock at other than true and correct weights, and ordering respondent Mendicoa to cease and desist from engaging in business without an adequate bond or its equivalent, issuing insufficient funds checks, and failing to pay when due for livestock. Respondent Mendicoa is ordered to keep full and correct records and is suspended for one year, and thereafter until he meets the bonding requirements. Respondent Call is prohibited from registering or operating subject to the Act for one year. Both respondents are jointly and severally assessed a civil penalty of \$10,000. Operating without an adequate bond, issuing insufficient funds checks, failing to pay when due, and shortweighing livestock are all violations of the Act. Adequate records must be kept of livestock transactions. An inference is drawn that the testimony of a respondent who did not testify would have been adverse to his position. Severe sanction policy summarized.

For E. Bruner, for Complainant.

For W. R. N. Searle, for Respondent Modesto Mendicoa.

Respondent Kimball Call, Pro se.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).<sup>1</sup> An initial Decision and Order was filed on February 22, 1988, by Administrative Law Judge Edward H. McGrail (ALJ) ordering respondents to cease and desist from weighing livestock at other than true and correct weights, and ordering respondent Mendicoa to cease and desist from engaging in business without an adequate bond or its equivalent, issuing insufficient funds checks, or failing to pay when due for livestock. Respondent Mendicoa is ordered to keep full and correct records and is suspended for one year, and thereafter until he meets the bonding requirements. Respondent Call is prohibited from registering or operating subject to the Act for one year. Both respondents are jointly and severally assessed a civil penalty of \$10,000.

On April 5, 1988, respondents appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>2</sup> The case was referred to the Judicial Officer for decision on April 20, 1988.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case with a few trivial changes. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

## ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

### Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter the "Act", instituted by a complaint filed on December 3, 1986, by the Packers and Stockyards Administration, U.S. Department of Agriculture (P&S, USDA).

The complaint alleged willful violations of the Act in that Respondent Mendicoa engaged in the business of a dealer buying and selling livestock for his own account without adequate bond coverage as required by the Act and the regulations; that in connection with his operations as a dealer he purchased livestock on the dates cited in the complaint and in purported



of such livestock; and that he failed to keep and maintain accurate books, records and memoranda which fully and accurately disclosed the nature of his operations.

It is further alleged that on or about December 31, 1985, in the actions cited in the complaint, that Respondents Mendicoa and Call engaged in unfair and deceptive trade practices in that they willfully falsified weights on livestock they were purchasing by attaching a magnet to counterweights on the scale used to weigh the livestock.

In answer, filed February 11, 1987, Respondent Mendicoa generally denied substantive allegations of the complaint, averred he maintained an estate bond, and although there were sufficient funds in his account to pay checks he issued, he stopped payment on them.

In answer, filed March 20, 1987, Respondent Call generally denied the substantive allegations of the complaint which were directed to him, and stated his mailing address to be 535 Gannett, Rock Springs, Wyoming 82901.

An oral hearing was held before the undersigned November 4, 5, and 6, 1987, at Lake City, Utah. Complainant was represented by Ben E. Bruner,

Attorney at Law, Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. Respondent Mendicoa was represented by Wayne R. Nelson, Esq., Manila, Utah. Respondent Call appeared *pro se*.

At the commencement of oral hearing, Respondent Call questioned whether he had been properly served. He also stated he was not represented by counsel because he had not been able to retain counsel during the period when Mr. Searle withdrew his service.<sup>1</sup> It is noted from the record that Mr. Searle filed answer on behalf of Respondent Call on March 20, 1987, and did not withdraw his service until August 7, 1987. During this period of time, all documents filed were served on Mr. Searle as Respondent Call's counsel. Subsequent to Mr. Searle's withdrawal, copies of all documents filed were sent by certified mail-return receipt requested to Respondent Call at his address of 535 Gannett, Rock Springs, WY 82901, and were either returned "undelivered" or "refused." In accordance with the Rules of Practice, 7 C.F.R. § 147, the documents were sent to Respondent Call by regular mail. Therefore, Respondent Call was properly served with all documents filed in this matter.

Further, Respondent Call had from August 7, 1987, when Mr. Searle withdrew his services, until the date of oral hearing, November 4, 1987, a period of approximately three months, in which to obtain the services of other counsel. He chose not to do so, evidently relying on the misconception that because he refused certified mail or did not claim it, he could ignore the process of the oral hearing. However, as stated, he was properly served via regular mail. It is noted that Notice of Oral Hearing was issued on July 6, 1987. Finally, as the record shows, Respondent Call participated in lengthy cross-examination of witnesses.

<sup>1</sup>Mr. Searle represented Respondent Call until he withdrew his services on August 7, 1987, because of conflict of interest in representing Respondent Mendicoa.

Filing of briefs was extended to January 18, 1988. Briefs, which have been duly considered, were filed by Complainant and Respondent Mendicoa.<sup>2</sup>

### Findings of Fact

1. Modesto Mendicoa, hereinafter referred to as Respondent Mendicoa, is an individual whose mailing address is P.O. Box 970, Rock Springs, WY 82901. (Complaint, Answer)

2. Respondent Mendicoa is, and at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account;

(b) In a partnership with Respondent Kimball Call engaged in the business of buying and selling livestock in commerce for their own account (CX 3; Tr. 31-32, 340, 349, 387, 526, 725, 734, 741);<sup>3</sup> and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce. (CX 1, 2)

3. Kimball Call, hereinafter referred to as Respondent Call, is an individual whose mailing address is 535 Gannett, Rock Springs, WY 82901 (Complaint, Answer)

4. Respondent Call is, and at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account;

(b) In a partnership with Respondent Mendicoa that engaged in the business of buying and selling livestock in commerce for their own account (CX 3; Tr. 31-32, 340, 349, 387, 526, 724, 734); and

(c) A "dealer" as that term is defined in the Act. (Tr. 694-699)

5. On February 18, 1986, Craig Hangsleben and Ken Soderberg, Investigators, P&S, USDA, began an audit of Respondent Mendicoa. The P&S Investigators received only Respondent Mendicoa's bank records. On February 19, 1986, Mr. Hangsleben served a subpoena duces tecum on Respondent Mendicoa requiring him to furnish complete records on March 4, 1986. When the two Investigators returned on March 4, 1986, the only

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<sup>2</sup>It is noted here that in filing findings on behalf of Respondent Mendicoa, Mr. Seale inadvertently attached a document dealing with another matter filed in a Utah State Court, Case No. 42358.

<sup>3</sup>Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent, respectively. References to the hearing transcript are designated "Tr."

tional records they were provided were two land sales contracts and three titization schedules. (CX 35; Tr. 106-107, 590, 605)

c. During his audit, Mr. Soderberg reviewed Respondent Mendicoa's bank records to determine the volume of business Respondent Mendicoa was having as a livestock dealer. Mr. Soderberg determined that Respondent Mendicoa purchased \$2,496,841.82 of livestock in the fourth quarter of 1984. (Tr. 591-92, 632)

f. On March 13, 1986, Mr. Soderberg sent Respondent Mendicoa a letter stating his present bond was inadequate and that, based on a recent audit, it was necessary for him to increase his bond to \$80,000. (CX 2, 31, 32; Tr. 591-594) On April 15, 1986, the Packers and Stockyards Administration notified Respondent Mendicoa by certified mail that notice of increase in his bond had not been received and that continued livestock transactions without a proper bond would necessitate administrative or court action against him in accordance with the Act and the regulations. (CX 31, 2-3; Tr. 593-595)

3. Notwithstanding the notices sent to Respondent Mendicoa to increase his bond, he failed to obtain the increase in his bond and continued to operate as a livestock dealer. (CX 32 A-F; Tr. 597-605)

9. Commencing in November, 1985, a group of livestock sellers located in Carbon County, Utah, was in contact with Respondents Mendicoa and Call for the purpose of selling livestock. The livestock sellers included Ranch 77, Larry Russell, Ray Park, Clint Sagers, Robert Sagers, Milton Sagers, Elmer Sagers, and Lavar Sagers (collectively referred to as the "Grazing Association"). (CX 22; Tr. 391, 432, 452-454, 469)

10. The oral contract terms agreed to by Larry Russell, as representative of the Grazing Association, and Respondent Mendicoa were that Respondent Mendicoa would pay 67 cents per pound for steer calves and 57 cents per pound for heifer calves without any restrictions on weight. This was agreed on November 14, 1985. Upon request for \$1,000 to seal the contract, Respondent Mendicoa gave two members of the Grazing Association \$500 each to seal the oral contract. (Tr. 197, 352, 387-389, 409, 433-35, 467, 725)

11. After a number of delays on the part of Respondents Mendicoa and Call, it was finally agreed that the livestock of the Grazing Association would be brought to a scale at Grantsville, Utah on December 31, 1985, for the purpose of weighing and sale. (Tr. 390-391, 409-411)

12. When the sellers arrived at the scale at Grantsville, Utah, Respondent Mendicoa informed them that there would be a price deduction for calves that weighed over 500 pounds. The penalty amounted to Respondents paying 60 cents per pound for steer calves weighing over 500 pounds and 50 cents per pound for heifer calves. (Tr. 192-193, 352, 369, 384-385)

13. The weighing was conducted in the same manner for all sellers. The seller stood next to Respondent Call who operated the livestock scale. Respondent Mendicoa stood next to the entry gate where the livestock were led to the scale facility. Respondent Mendicoa controlled the number of livestock to be weighed on each draft, as well as the people allowed into the scale area. (Tr. 163-64, 185, 343-44, 393-94, 414, 417, 455-56)

14. Larry Russell's calves were weighed last. Prior to the next weighment of Mr. Russell's calves, Respondent Call balanced the scale. Before he balanced the scale, Mr. Russell observed that he put his hand on the metal counterbalance weight, removed a magnet and placed it in his pocket. The scale was then balanced. Respondent Mendicosa then took the group of calves brought on the scale. Mr. Russell then looked under the metal counterbalance weight to see if any foreign objects were attached. He saw none. The calves were placed on the scale. Respondent Call was standing by the scale with his hands in his pockets. Mr. Russell asked Respondent Call to pull his hands out of his pockets, walk back up to the scale, open up his hand under the metal counterbalance weight, and place a magnet on it. At the same time, he heard a metallic clink from the bottom of the metal counterbalance weight. Respondent Call then proceeded to weigh the livestock. (Tr. 345, 394-95, 422-24, 447-48)

15. After hearing the clink under the counterbalance weight, Mr. Russell asked Respondent Call to cease weighing the livestock and left the scale area to obtain Deputy Sheriff Wally Wickham, of Tooele County, who was on duty at the scale area operating in his capacity as a brand inspector. Mr. Russell advised Deputy Wickham of what he had observed and they both returned to the scale area. (Tr. 395-96, 425)

16. Upon arriving back at the scale area, Deputy Wickham asked Respondent Call for the magnet he had used on the scale. Respondent Call denied he had a magnet and began manipulating the balance ball on the scale. Respondent Call then walked out of the scale house followed by Mr. Russell and Deputy Wickham. Mr. Russell advised Deputy Wickham that Respondent Call had placed the magnet in his right-hand pocket after taking it from the metal counterbalance weight. (Tr. 396, 459, 504)

17. Respondent Call walked out of the scale area followed by Mr. Russell and Deputy Wickham. Upon questioning by Deputy Wickham, Respondent Call denied having a magnet in his pockets and tossed out some of his matchbooks from them. After repeated denials that he had a magnet, Respondent Call was informed by Deputy Wickham that unless Respondent Call showed what was in his pockets, he would be arrested and searched. At that time, Respondent Call pulled his hand out of his pocket and showed Deputy Wickham a small magnet. (Tr. 164-65, 345, 396-97, 454, 505, 507-508)

18. After the magnet was produced, the sellers ascertained the weight difference caused by the use of the magnet at each weighment was between 43-45 pounds less than actual weights. Subsequent tests by a scale official from the Department of Agriculture scale official on the same scale and with the same magnet showed that the magnet caused the scale to weigh 45-50 pounds less. (CX 30; Tr. 313-17, 397-98, 460)

19. Following the discovery of the magnet, Respondent Mendicosa refused to reweigh the livestock. However, with the discovery of the magnet and the estimated loss in weight caused by the magnet, Respondents Mendicosa and Call agreed to pay to the sellers the originally agreed upon price of 67 cents per pound for steer calves and 57 cents per pound for heifer calves. The sellers would not press charges against them. Additionally, 50 pounds of

weightment was added to some of the sellers, including Messrs. Russell (one weightment only), Clint Sagers, Elmer Sagers, Lavar Sagers and Ray Park. Ranch 77 was compensated at a later date. (CX 24-29; RX 1; Tr. 168-69, 397-98, 443, 461, 504-505)

20. After the sellers were paid, Deputy Wickham arrested Respondent Call and took him to the Sheriff's Office. While in the Sheriff's Office, Deputy Wickham, together with Detective Alan James of the Tooele County Sheriff's Office, decided to stop Respondent Mendicoa's trucks containing the calves purchased at Grantsville, Utah, in order to reweigh the calves. However, the Daggett, Utah, County Sheriff had already stopped the trucks and placed the livestock in Respondent Mendicoa's corrals at Manila, Utah. The next afternoon, January 1, 1986, the calves purchased at Grantsville, Utah, plus one unidentified calf, were reweighed at Manila. (CX 33; Tr. 506-08, 531-33, 573)

21. At the Grantsville weighing, there were 198 head weighing a total of 92,730 pounds with an average weight of 468 pounds. At the reweighing at Manila, there were 199 head weighing a total of 90,020 pounds with an average weight of 452 pounds (or subtracting one head out, 89,570 pounds with an average weight of 454 pounds). (CX 37, 38; Tr. 207-212, 240)

22. At no time between the weighing at Grantsville and the reweighing did these livestock have feed or water. (Tr. 364, 506, 516, 563)

23. It can be determined from reviewing the Manila and Grantsville weighings that the weights at Grantsville were false, because the shrink between the two weighings was insufficient. (CX 37; RX 2; Tr. 207-212, 240, 246)

24. Respondent Mendicoa, in connection with his operations as a dealer, on or about the dates and in the following transactions, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn, or held at the recipient's request as a collection item, because Respondent Mendicoa did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented:

DATE OF CHECK	SELLER	NO. OF HEAD	AMOUNT
12/19/85	Veral Bird	182	\$51,498.33
12/23/85	Producers Livestock	19	5,368.21
12/28/85	Kent Smith	4	1,685.00
11/19/85	Herbert Tanner	1	187.51
11/29/85	David Sweat	39	14,124.55
12/04/85	Steve B. Wilkinsen	5	1,242.00
12/24/85	Weber Livestock	72	18,705.39
12/31/85	Larry Russell	44	13,937.75
12/28/85	Ray Park	29	7,321.35
12/31/85	Clinton Sagers	9	2,419.95
12/31/85	Robert Sagers	8	2,246.40
12/27/85	Milton Sagers	17	5,078.20
12/30/85	Elmer Sagers	8	1,962.30

DATE OF CHECK	SELLER	NO. OF HEAD	AMOUNT
12/30/85 (CX 6-21; Tr. 35-60, 282-85)	Lavar Sagers	4	983.30

25. All of the transactions listed in paragraph 24 above were subsequent to the close of the next business day following the sale of livestock (CX 4)

### Discussion and Conclusions

#### Operating Without Adequate Bond

The requirement that a reasonable bond be maintained by a dealer is imposed by the Act and the regulations. (7 U.S.C. § 204; 9 C.F.R. §§ 201.201.30)

It has been held that operating without an adequate bond or its equivalent is a willful violation of section 312(a) of the Act. (7 U.S.C. § 213(a)) *See* *Chantou*, 46 Agric. Dec. \_\_\_ (July 13, 1987); *In re Ronald Hageman*, 42 Agric. Dec. 531 (1983); *In re James*, 43 Agric. Dec. 850 (1984).

The record clearly shows that based on examination and audit of volume of business, taken from Respondent Mendicoa's dealer livestock records, bank records, and annual report (1984), that his bond should be increased to \$80,000. Respondent Mendicoa was advised of this by Packers and Stockyards Administration letters of March 13, 1986, and April 15, 1986. The latter also advised that if adequate bond was not filed Respondent Mendicoa continued his livestock operations, that appropriate administrative or court action would be taken. The record shows the above letters were ignored and that during 1986, Respondent Mendicoa continued to operate as a dealer purchasing and selling livestock without adequate bond coverage. Nor does an interest bearing bond fulfill respondent's obligations under statutory and regulation requirements.

A violation is willful if respondent intentionally does an act which is prohibited, or acts with careless disregard of statutory requirements. *See* *Garver*, 45 Agric. Dec. 1090 (1986), *reconsideration denied*, 45 Agric. Dec. 1090 (1986) [ *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988) ]; *re Farrow*, 42 Agric. Dec. 1397, 1433 (1983) [ *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985) ]; *Butz v. Glover Livestock Commission Co.*, 398 U.S. 182, 185, 187 (1973); *In re Vealey*, 39 Agric. Dec. 8 (1979).

#### Respondent Mendicoa Issued "Insufficient Funds" Checks and Failed to Cash When Due

The record is clear that Respondent Mendicoa on or about the dates listed in the transactions cited in Finding No. 24, purchased livestock and issued purported payment issued checks which were returned for insufficient funds or would have been so returned if not held by the depositor's wishes.

ica item. Not only were these transactions shown through documentary evidence but they were also confirmed by a bank official, Mr. William R. A. A longstanding relationship with Respondent Mendicoa's bank in the name of his account or a line of credit does not mitigate in his favor. *In ver, supra*.

the failure to pay promptly and fully for livestock and the issuance of "faint funds" checks is a willful violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228(b)). *In re A. W. Schmidt & Son, Inc.*, 46 Agric. Dec. [586 (1987)]; *In re Cattleman's Commission Company*, 45 Agric. Dec. [344] (1986); *In re George County Livestock, Inc.*, 45 Agric. Dec. [2342] (1986); *In re Roy Mayer and Jim Doss*, 43 Agric. Dec. 439 (1984) [(decision respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984)]; *In re Trenton Livestock, Inc.*, 41 Agric. Dec. 1965 (1982).

#### Failure to Maintain Records to Adequately Disclose True Nature of Livestock Transactions

The investigator for the Packers and Stockyards Administration, USDA, obtained all records maintained by Respondent Mendicoa dealing with his livestock transactions. The investigator, Mr. Ken Soderberg, was only provided with bank records. A subpoena duces tecum was issued to Respondent Mendicoa requesting specific and detailed records of his livestock transactions. In response to these specific requests, Mr. Soderberg was only provided with two land sales contracts and three amortization schedules. However, Mr. Soderberg testified that compliance with section 401 of the Act (7 U.S.C. § 221) requires a dealer to maintain purchase and sales invoices, tickets, a general ledger and a cash receipts and disbursements journal. Respondent Mendicoa did not do.

The failure to keep accounts and records which fully and correctly disclose his operations is a willful violation of section 401 of the Act (7 U.S.C. § 221) and the regulations (9 C.F.R. §§ 201.49, 201.55). *In re White*, 47 Agric. Dec. [ ] (January 11, 1988) [*aff'd per curiam*, No. 88-3144 (6th Cir. Dec. 15, 1988)] (unpublished); *In re Saylor*, 44 Agric. Dec. 2238 (1985); *In re Arab Yard, Inc.*, 37 Agric. Dec. 293 (1978) [*aff'd mem.*, 582 F.2d 1168 (8th Cir. 1978)] (unpublished).

#### Deliberately Shortweighing Livestock By Use of Magnet

There is no doubt that credible testimony, substantiated by documentary evidence, shows that the scale weights at the Grantsville, Utah, facility were deliberately manipulated by use of a magnet to the detriment of the sellers. Although there is a slight conflict between Respondent Call and Mr. Larry Russell, testimony of record concerning the events leading up to, and surrounding the weighing of Mr. Russell's cattle, preclude placing any reliability on the testimony of Respondent Call. Nor is Respondent Mendicoa's part in shortweighing to be overlooked.

As noted, the original oral contract between respondents and the Grazing Association called for payment of 67 cents per pound for steer calves and 57

cents per pound for heifer calves without weight penalty. This oral contract was later secured as a binding contract by payment from Respondent Mendicco of \$500 to each of two members of the Grazing Association. Initially, \$1,000 was requested by Mr. Russell as representative of the Grazing Association (Finding No. 10). However, when the sellers unloaded the livestock at the Grantsville scale they were advised by Respondent Mendicco that, take it or leave it, the prices were changed to 60 cents and 50 cents respectively, for calves weighing over 500 pounds (Finding No. 12).

Although the Grantsville scale had a 12,000 pound capacity which could accommodate a maximum of 15 calves, nevertheless, Respondent Mendicco controlled the entrance gate to the scale and limited weighings to four or five head of calves. (Tr. 204-05) He called for repeated balancing of the scale between weighments, and kept the sale area clear of other parties except the seller whose livestock was being weighed. It can only be inferred from the above and from later events that these actions were taken to provide Respondent Call opportunity to manipulate the weight of the livestock by use of a magnet attached to the metal counterbalance weight. The magnet was removed during the balancing of the scale, and placed back under the metal counterbalance weight when the livestock were placed on the scale platform for weighing. Use of the magnet shortweighed the livestock.

Mr. Russell, a very creditable witness, observed Respondent Call remove the magnet from the metal counterbalance weight during the balancing of the scale preceding the weighing of his livestock. After his livestock were on the scale for weighing, he observed Respondent Call place his hand under the metal counterbalance weight and heard the "clink" of the magnet as it attached itself thereto. The events which followed substantiated Mr. Russell's observation.

After denying possession of the magnet, Respondent Call finally surrendered it to Deputy Sheriff Wickham who retained custody of the magnet. Following this discovery, Respondent Mendicco refused to reweigh the livestock. After the magnet was produced by Respondent Call, the seller determined that the weight difference caused by the use of the magnet resulted in each weighing being between 43-45 pounds less than actual weights. When this was determined, and, in order to appease the seller, Respondents Mendicco and Call agreed to pay the original contracted price of 67 cents and 57 cents, as well as make increased adjustments in the weight previously provided the sellers. Documentary evidence, as well as testimony, substantiate these makeshift adjustments. Further, statements made by Respondent Call to Mr. Russell also substantiate the use of the magnet, i.e., "\_\_\_\_\_ just between me and you, \_\_\_\_\_ we had to do this because we were losing our [expletive deleted] on these big calves." (Tr. 399) "\_\_\_\_\_ if you don't press charges against me, I'll give you 67, 57, straight through \_\_\_\_\_" (Tr. 397) These statements were not rebutted by Respondent Call.

Further testimony and documentation of record shows that the involved livestock were shortweighed at the Grantsville scale by the respondents. The night of the Grantsville weighing these same calves were off-loaded in separate pens at Respondent Mendicco's ranch at Manila, Utah. Here there is conflict in the testimony of Ms. Niki Walk, Respondent Mendicco's



girlfriend, his truck driver, Ray Widmer, and Respondent Call, with the testimony of Deputy Sheriff Wickham and Detective Allen James on the question of whether there was feed and water in the pens at Manila. I conclude that the testimony of these two officers is more than credible whereas the testimony of Ms. Walk, Mr. Widmer and Respondent Call was questionable and self-serving.

Both officers were present for the weighing at Manila. Deputy Sheriff Wickham circulated in the pens identifying the calves that were weighed at Grantsville. At Grantsville, he had identified the calves involved by recorded owner brands and by ear marks. With this identification in hand, Detective James, who was also in the pens at Manila, then separated them for weighing. Both officers testified that there was no feed in the pens. Both officers further testified that the weather was so cold that a workman at the Manila ranch was using something similar to a blowtorch in an attempt to thaw out frozen water pipes that ran into the pens. Thus, since feed and water were not available in the pens, these elements could not account for any weight increase at the weighing at Manila. Nor is there any doubt that the calves weighed at Grantsville were the same calves identified by Deputy Sheriff Wickham at Manila since they were matched up by recorded brands and earmarks. (Tr. 538-39)

Mr. Paul Peterson, a scale and weight expert, P&S, USDA, testified that, based on his examination of the scale at Grantsville, conducting weighments with and without the magnet obtained from the custody of Deputy Sheriff Wickham, documentary evidence and his interviews with some of the sellers, he concluded that the livestock did not shrink sufficiently enough between the weighings at Grantsville and Manila and thus were shortweighed at Grantsville. Mr. Peterson's conclusion is corroborated by the opinion of Dr. Haven B. Hendricks, Associate Professor, Animal, Dairy and Veterinary Science Department, Utah State University. Professor Hendricks used two formulas for determining shrink of the involved livestock. Taking into consideration all of the factors present here, i.e., livestock off feed overnight before weighing at Grantsville, the haul to Grantsville, standing dry after the weighing, the 200-mile haul to Manila, off feed until weighing the next day, plus haul to reweighing at Manila, Professor Hendricks found the shrink under both formulas to be insufficient. The conclusion to be drawn is that the livestock would have had to be shortweighed at Grantsville in order for this to occur. This concept of shrink is not challenged by respondents, rather they rely on the fact that the livestock had access to feed and water at Grantsville and prior to the second weighing at Manila in order to account for the insufficient shrink. As has been shown, that reliance has not been found creditable. Thus, the preponderance of the evidence of record shows that Respondents Mendicoa and Call manipulated the weighing of livestock by placing a magnet on the metal counterbalance weight, thereby shortweighing the livestock.

It has been well established that purchasing livestock on false weights constitutes an unfair and deceptive practice and a flagrant and serious violation of section 312(a) of the Act, 7 U.S.C. § 213(a). *In re White*, 47 Agric. Dec. \_\_\_\_ (January 11, 1988) [ *aff'd per curiam*, No. 88-3144 (6th Cir.

Dec. 15, 1988)]; *In re Saylor*, 44 Agric. Dec. 2238, 2636-44 (1985); *In re Upton*, 44 Agric. Dec. 1936, 1958, *order on reconsideration*, 44 Agric. Dec. 2861 (1985); *In re Muehlenhaier*, [3]7 Agric. Dec. 313, *aff'd mem.* 590 F.2d 340 (8th Cir. 1978); *In re Cordale Livestock Co.*, 36 Agric. Dec. 1114, 1133 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 987 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1822-52 (1975).

As to whether respondents formed a partnership, respondents deny such existed. However, the record is replete with testimony to the contrary. Mr. Hansen (Ranch 77) and Mr. Russell believed that Respondents Mendicoa and Call were in partnership with Respondent Mendicoa supplying the money and Respondent Call the work to put together the deal. (Tr. 340, 348, 387) Respondent Call's own testimony imparted this same relationship, i.e., "We'd lose, the thousand would be certainly hard to obtain, though it had been given in down payment. We would lose \$1,800 for the three trucks going without cattle, going empty. We'd lose the profit factor that was built into the deal with Mr. Bouziden." " \_ \_ \_ we sold the cattle to Mr. Bouziden right within a matter of a day or so after we notified them we would purchase the cattle." (Tr. 725) "Yes, we'd still realize a profit." (Tr. 726) "Mr. Mendicoa \_ \_ \_ would receive a portion of the profits. If it didn't work, he'd receive a portion of the losses." (Tr. 734) Thus, there is no doubt that a partnership existed. Partnership is defined as "[a] voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there will be a proportional sharing of the profits and losses between them." 68 C.J.S. Partnership, § 1; (See also *Black's Law Dictionary* (5th ed., West 1979)). In such capacity Respondent Call was also acting as a dealer as that term is defined in the Act.

Finally, although Respondents Mendicoa and Call were present during the entire hearing, only Respondent Call testified, and then as an adverse witness in regard to Respondent Mendicoa. (Tr. 690) Under settled principle that has been followed in many proceedings before the Secretary, and which has also been followed in many judicial proceedings, I infer that Respondent Mendicoa's testimony would have been adverse to his interests here. *In re Cattleman's Commission Company*, 45 Agric. Dec. 234, 255-56 (1986), and cases cited therein. (See also *In re Corn State Meat Company, Inc.*, 45 Agric. Dec. 995, 1018-19).

### Sanction

As previously found, purchasing livestock on false weights constitutes an unfair and deceptive practice. Similarly, operating without adequate bond, the issuance of insufficient funds checks, failure to pay, when due, and failure to maintain adequate records are equally willful violations of the Act.

Complainant here seeks a cease and desist order from these practices, that Respondent Mendicoa be suspended from operating for a period of one year, that Respondent Call be prohibited from being registered by the Secretary of Agriculture for a period of one year, that Respondents Mendicoa and Call be

and severally assessed a civil penalty of \$10,000, and that Respondent coa be ordered to keep necessary records.  
as long been the policy of the Secretary to impose severe sanctions for violations, as shown here, both to deter respondents and to serve as a deterrent to others. *In re White, supra*; *In re Miller*, 33 Agric. Dec. 409 (1988) *aff'd sub nom.*, *Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974). I find that the actions sought by complainant are wholly consistent with the Secretary's policy, as expressed in the above decisions, to effectuate the purposes of the regulatory program.

# ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Mendicoa was present during the entire hearing, but failed to appear at the hearing. Under the settled principle that has been followed in many cases before this Department,<sup>4</sup> and which has also been followed in judicial proceedings,<sup>5</sup> it was proper for the ALJ to infer that respondent

1. *In re Great American Veal, Inc.*, 48 Agric. Dec. \_\_\_\_ (Jan. 19, 1989), appeal docketed, 3408 (3d Cir. Feb. 22, 1989); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. \_\_\_\_ (Jan. 9, 1988) (order denying reconsideration), appeal docketed, No. 88-3214 (7th Cir. Nov. 15, 1988); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. \_\_\_\_ (Aug. 13, 1987); *In re Corn Leaf Co.*, 45 Agric. Dec. 995 (1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 Agric. Dec. 234 (1986); *In re Grady*, 45 Agric. Dec. 66 (1986); *In re Haring Meats and Sausages, Inc.*, 44 Agric. Dec. 1886 (1985); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision affirmed); *In re Peay*, 43 Agric. Dec. 1406 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984); *In re Jarroz Produce Farms, Inc.*, 42 Agric. Dec. 1505 (1983); *In re Farrow*, 42 Agric. Dec. 1983, *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits affirmed; some reverses); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 1125, 1130 (7th Cir. 1983); *In re Stanper*, 42 Agric. Dec. 20, 32 n4 (1983), *aff'd*, 722 F.2d 718 (7th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 7 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 26, 1982), remanded, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), order on remand, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, cited *in part*); *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Great Western Meat Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37 Agric. Dec. 1639, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir. 1977) (2-1 decision), cert. denied, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 993, 995, *aff'd mem.*, 583 F.2d 39 (5th Cir. 1978); *In re Burns*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 37-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), cert. denied, 449 U.S. 1061 (1981); *In re Lorez*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casco*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenon Livestock, Inc.*, 33 Agric. Dec. 199, 514 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 32 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Galber & Co.*, 31 Agric. Dec. 474, 499 (1972).

2. *Wigmore, Evidence* §§ 285-91 (3d ed. 1940); *United States v. Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939); *Kirby v. Tallmadge*, 160 F.2d 379, 383 (1946); *Karavas Compania, Etc. v. Atlantic Export Corporation*, 588 F.2d 1, 9-10 (1st Cir. 1978); *International Union v. NLRB*, 455 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Millbank* (continued...)

Mendicor's testimony would have been adverse to his interests here. "It certainly is a maxim that all evidence is to be weighed according to the preponderance which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch v. Archer*, 106 E.R. 66, quoted with approval in Wigmore, *Evidence* § 285 (3d ed. 1940).

It is the policy of this Department to impose severe sanctions for violation of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, e.g., *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 2424-32, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), attached as Appendix to this decision.<sup>6</sup>

It should be noted that significant changes were made in the Department's sanction policy following (and as a result of) the holding in *Farrow v. USD*, 760 F.2d 211 (8th Cir. 1985). The legislative history of the Act and the material relevant to the *Farrow* decision are set forth in *Spencer*, 46 Agric. Dec. at 424-31, 455-62 (Appendix at 198-208, 242-51).

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, e.g., *re Ferguson*, 48 Agric. Dec. \_\_\_\_ (Mar. 1, 1989) (6-month suspension);

<sup>6</sup>(...continued)

*Mtn. Ins. Co. v. Wentz*, 352 F.2d 592, 597 (8th Cir. 1965); *Gronling v. Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Huffman v. CIR*, 298 F.2d 784, 788 (3d Cir. 1962); *Central R.R. Co. v. Staples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neldhofner v. Automobile Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles v. Lentini*, 151 F.2d 615, 617 (7th Cir.), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Rauloff*, 108 F.2d 213, 217 (C.C.P.A. 1939); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 867-68 (2d Cir.), *cert. den.* 304 U.S. 576 (1938).

<sup>7</sup>Severe sanctions issued pursuant to the Department's severe sanction policy were similar, e.g., in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (5th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (5th Cir. 1980) (unpublished); *In re Gold Belt-J&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1979), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Mushlenhater*, 37 Agric. Dec. 313, 330-32, 337-32, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergl*, 570 F.2d 701 (8th Cir. 1978); *In re Cordale Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 36 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *aff'd*, 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished); *cert. denied*, U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 570 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Traganth Co.*, 33 Agric. Dec. 1884, 1913 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 493, 530-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 52, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

\$25,000 civil penalty (held in abeyance) for increasing prices in commission transactions); *In re Great American Veal, Inc.*, 48 Agric. Dec. \_\_\_\_ (Jan. 19, 1989) (\$129,000 civil penalty for failing to pay for livestock, operating while insolvent, giving undue preference to a creditor, and taking over another packer's inventory without paying the packer's creditors), *appeal docketed*, No. 89-3108 (3d Cir. Feb. 22, 1989); *In re Tiemann*, 47 Agric. Dec. \_\_\_\_ (Oct. 20, 1988) (5-year suspension for failure to pay \$27,000 for livestock, to be terminated after 180 days if full payment made); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. \_\_\_\_ (Aug. 13, 1987) (1-year suspension for custodial account violations and various fraudulent activities); *In re Parchman*, 46 Agric. Dec. 791 (1987) (90-day suspension and \$10,000 civil penalty for weighing violations), *aff'd*, 852 F.2d 858 (6th Cir. 1988); *In re Rotches Pork Packers, Inc.*, 46 Agric. Dec. 573 (1987) (\$50,000 civil penalty for failing to pay for meat products); *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268 (1987) (10-year suspension and \$30,000 civil penalty for increasing prices and weights in commission purchases), *aff'd*, 841 F.2d 1451 (9th Cir. 1988); *In re Welch*, 45 Agric. Dec. 1932 (1986) (decision as to Benson) (\$10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act for fraud by an auction market employee); *In re Garver*, 45 Agric. Dec. 1090 (1986) (2-year suspension for failing to pay for livestock), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986) (\$50,000 civil penalty for commercial bribery), *remanded*, 820 F.2d 1103 (9th Cir. 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986) (\$50,000 civil penalty for commercial bribery); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590 (1986) (6-month suspension for custodial account and check-kiting violations), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year, for check-kiting, custodial account and payment violations, and purchasing livestock for speculation out of consignments); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand) (8-month suspension and \$10,000 civil penalty for fraudulent sales and purchases); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final consent decision*, 44 Agric. Dec. 1971 (1985) (\$10,000 civil penalty for discriminatory promotional allowances); *In re Powell*, 46 Agric. Dec. 49 (1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. 1220 (1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984) (\$77,000 civil penalty, with \$27,000 suspended, for payment, bond and trust violations); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year suspension for payment violations), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. 1848 (1983) (\$20,000 civil penalty for bait-and-switch advertising and deceptive practices), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

For the foregoing reasons the following Order should be issued.

### Order

Respondent Modesto Mendicoa, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they were drawn to pay the checks when presented; and

3. Failing to pay, when due, for livestock purchases.

Respondents Modesto Mendicoa and Kimball Call, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Weighing livestock at other than their true and correct weights; and

2. Engaging in any act or practice involving the manipulation of weights so as to purchase or sell livestock on the basis of other than the actual weight of the livestock.

Respondent Modesto Mendicoa shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of transactions involved in his business operations subject to the Packers and Stockyards Act, including:

1. All livestock purchase and sales invoices;
2. Scale tickets; and
3. Livestock purchase and sales journals.

Respondent Modesto Mendicoa is suspended as a registrant for a period of one year and thereafter until he complies fully with the bonding requirements of the Act and the regulations. When Respondent Mendicoa demonstrates that he is in compliance with such bonding requirements, supplemental order will be issued in this proceeding terminating the suspension after the expiration of the one-year period.

Respondent Kimball Call shall not be registered by the Secretary of Agriculture under the Act for a period of one year and is prohibited from

ting subject to the Act during that period in accordance with section 303 Act (7 U.S.C. § 203), and section 201.10 of the regulations (9 C.F.R. § 1).

accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents Modesto Mendicoa and Kimball Call are hereby assessed, jointly and severally, a civil penalty in the amount of \$10,000. The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, mailed to the Assistant General Counsel, Room 2446, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this Order on respondents.

The cease and desist and recordkeeping provisions of this Order shall become effective on the day after service of this Order. The suspension and prohibition provisions shall become effective on the 30th day after service of this Order on respondents: *Provided, however*, That if by any means or device, however, all or part of the suspension or prohibition period is not effectively avoided during the period indicated above, the effective date of the beginning of the suspension or prohibition period (or the part thereof not effectively avoided) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto, or (ii) upon a showing made by the complainant that it is not likely that such an order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby conferred by the Judicial Officer indefinitely for this limited purpose).

#### APPENDIX

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 32, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

vs. HUMBOLDT AUCTION YARD, INC., LELAND MORA and RUDOLF MORA, JR.

Docket No. D-88-9.

Original Motion for Reconsideration filed March 16, 1989.

Grounds for length of suspension - Insolvency - Failure to pay promptly - Purchases from consignment.

The statutory standard for determining the length of time a registrant is suspended is "a reasonable specified period." Respondents engaged in unfair and deceptive practices under the Act by conducting business when its current liabilities exceeded its current assets, by issuing checks in payment for livestock purchased on a cash basis without obtaining written permission, and by issuing checks in payment for cash purchases dated after the close of business day. The rate respondent allowed purchases out of consignment on employee's personal account.

For Y. Stanton, for Complainant.

For W. Olsen, for Respondents.

Original Motion For Reconsideration issued by Victor W. Palmer, Chief, Administrative Law

1.

Complainant has moved that I reconsider the February 1, 1989, decision entered in this case. Complainant submitted that I erroneously based a 28 day suspension of the corporate respondents' registration on factors applicable only to civil penalty sanctions. Respondents have filed a suggestive opposition to complainant's motion. Both positions have been studied and considered.

Complainant is correct that the statutory standard for determining the length of time a registrant is suspended is "a reasonable specified period" (7 U.S.C. § 204). Both the Judicial Officer and the Ninth Circuit have recognized that this standard was not changed when the Packers and Stockyards Act was later amended to further authorize sanctioning registrants by the assessment of civil penalties determined on the basis of three specified criteria.

Accordingly, the Decision and Order dated February 1, 1989, is hereby being vacated and an Amended Decision and Order is being issued which correctly states the statutory standard for a suspension.

However, under the "reasonable specified period" standard which gives the deciding officer greater latitude, I still believe the 28 day suspension requested by complainant to be excessive and therefore unreasonable; it would seriously impair respondents' ability to stay in business and was largely based on complainant's erroneous perception that the sales to Mora were deliberately transacted to allow him to acquire special advantage and profit. Under the circumstances of the case, I have again concluded that fourteen days is a "reasonable period" to specify for the suspension of the corporate respondents as a registrant.

An Amended Decision and Order is being issued in conformity with this ruling.

#### Amended Decision and Order Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*, "the Act"), instituted by a complaint filed on October 21, 1987, by the Administrator of the Packers and Stockyards Administration, United States Department of Agriculture. The complaint was subsequently amended at the oral hearing in this matter.

The amended complaint alleges that Respondent Humboldt Auction, Inc. (Humboldt) under the direction, management and control of Respondent Leland Mora and Respondent Rudolf Mora, Jr., wilfully violated various sections of the Act (7 U.S.C. §§ 213(a), 228b) and regulations promulgated pursuant to the Act (9 C.F.R. §§ 201.43(b)(1), 201.56) by 1) operating Humboldt while current liabilities exceeded current assets; 2) issuing drafts for payment for livestock purchased on a cash basis; 3) failing to pay, when due, the full purchase price of certain livestock; and 4) permitting its partner, Rudolf Mora, Jr., to regularly purchase livestock which had been consigned to Humboldt for sale on a commission basis, for speculative resale at Humboldt Auction Yard, of which Rudolf Mora, Jr. was a part owner.



Respondents filed an answer on November 12, 1987, in which they admitted the jurisdictional allegations but denied all of the substantive allegations. Respondents also alleged an affirmative defense that complainant had failed to comply with Section 558 of the Administrative Procedure Act (5 U.S.C. § 558) and was therefore barred from imposing any sanction in this case.

An oral hearing was held before me on August 30, 1988, in Eureka, CA. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, appeared on behalf of the complainant. Gerard D. Eftink, Van Hooser, Olsen and Parkinson, P.C., Kansas City, MO, appeared on behalf of the Respondents.

Briefing was completed on November 4, 1988, when the parties submitted proposed findings of fact and conclusions of law. All proposed findings, conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, the proposed findings, conclusions and arguments have been rejected as irrelevant, immaterial or lacking legal or evidentiary basis.

For the reasons set forth in the findings and conclusions which follow, an order is being entered directing respondents to cease and desist from operating Humboldt Auction Yard in a condition of insolvency; issuing drafts in payment for livestock in the absence of prior written agreements with sellers as to such form of payment; failing to pay, when due, the full purchase price of livestock; and permitting Rudolf Mora, Jr., or any other owner, officer, agent or employee of Humboldt, or any firm, such as Ukiah Auction Yard, Inc., in which Humboldt or its owners, officers, agents or employees have an ownership or financial interest, to purchase livestock out of consignment for resale. The order also suspends the corporate respondent as a registrant under the Act for a period of fourteen days. This amended decision and order has been issued in substitution for the original decision and order issued on February 1, 1989, in response to complainant's motion to reconsider, to correctly state and apply the statutory standard for determining the length of a suspension.

### Findings of Fact

1. Humboldt Auction Yard, Inc. is a corporation whose business address is 603 Third St., Box 313, Fortuna, CA 95540.

2. Humboldt is, and at all times material herein, was:

(a) engaged in the business of conducting and operating the Humboldt Auction Yard, a posted stockyard under the Act;

(b) engaged in the business of buying and selling livestock in commerce for its own account or for the account of others;

(c) engaged in the business of buying and selling livestock in commerce on a commission basis; and

(d) registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce on a commission basis.

3. Leland Mora is, and at all times material herein was, the manager, secretary/treasurer and a 6.23 per cent shareholder of Humboldt.

4. Rudolf Mora, Jr. is, and at all times material herein was, a director and 43.77 per cent shareholder of Humboldt. He also is, and at all times material herein was, the general manager and an 8.6 per cent shareholder of Ukiah Auction Yard, Inc., Ukiah, CA.

5. Leland Mora and Rudolf Mora, Jr. direct, manage and control business activities of Humboldt which are material herein.

6. In a letter dated April 6, 1984 and sent to Humboldt, the Lawndale, CA, Regional Office of the Packers and Stockyards Administration informed Humboldt of the promulgation of 9 C.F.R. § 201.56 and briefly explained its provisions.

7. According to balance sheets prepared from Humboldt's financial records as of April 30, 1986 and July 31, 1986, Humboldt's current liabilities exceeded its current assets. The calculations of current assets as of the above dates were subsequently revised to include livestock which had originally been classified as a fixed asset and continue to show that Humboldt's current liabilities exceeded its current assets. Livestock owned by the Heart Ranch Partnership, in which Humboldt had a 50 per cent interest, were included in current assets of Humboldt on the dates in question.

8. Humboldt conducted business subject to the Act between April 30, 1986, and July 31, 1986, a period during which its current liabilities exceeded its current assets.

9. On six occasions, five of which occurred between April 30, 1986, and July 31, 1986, Humboldt issued drafts in payment for livestock purchased on a cash basis without first obtaining express written agreements from the sellers to accept drafts. In at least three of these transactions, there were no written agreements to accept drafts.

10. On 27 occasions, 22 of which occurred between April 30, 1986, and July 31, 1986, Humboldt issued checks in payment for cash purchases of livestock which were dated after the close of the business day following the purchases. There were no written agreements to extend credit in any of the transactions. However, in some of the transactions, there were no written agreements to accept delayed payment from Humboldt.

11. On four occasions in 1986, Rudolf Mora, Jr., acting as an individual or as the agent of Ukiah Auction Yard, Inc., purchased a total of 35 head of livestock which had been consigned to Humboldt. The purchases were made openly at auction.

These cattle were primarily of low quality, and demand for such animals in the Humboldt area is low. As general manager of the Ukiah Auction Yard, Rudolf Mora, Jr. knew of the considerably greater demand for low quality cattle at Ukiah. His purchases of cattle at Humboldt provided Ukiah with low quality cattle and gave Humboldt's consignors higher prices than those offered by local bidders who had little use for low quality animals. Mora was not

shown to personally profit by these transactions which he considered to be a form of market support for Humboldt's consignors.

12. The four purchases of low quality cattle by Rudolf Mora, Jr. were not recorded in Humboldt's market support journal.

13. Respondents Leland Mora and Rudolf Mora, Jr., and the stockyard operations with which they are connected, enjoy excellent reputations for truth and fair dealing among cattlemen in the Fortuna and Ukiah areas.

### Conclusions

1. Respondents engaged in an unfair and deceptive practice under the Act by Humboldt's operation subject to the Act while insolvent.

2. Respondents engaged in an unfair and deceptive practice under the Act by issuing drafts in payment for livestock purchased on a cash basis without first obtaining express written agreements from sellers to accept the drafts.

3. Respondents engaged in an unfair and deceptive practice under the Act by issuing checks in payment for cash purchases of livestock which were dated after the close of the business day following the purchases.

4. The corporate respondent engaged in an unfair and deceptive practice in violation of the Act by permitting Rudolf Mora, Jr. to purchase livestock out of consignment for his own account or as an agent of Ukiah Auction Yard, Inc., for resale at Ukiah Auction Yard.

### Discussion

#### 1. Insolvency

It is well established that operating as a dealer or market agency subject to the Act while insolvent is an unfair and deceptive practice under section 312(a) of the Act (7 U.S.C. § 213(a)). *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd sub nom. Blackfoot Livestock Comm'n Co. v. Dep't of Agric., Packers and Stockyards Admin.*, 810 F.2d 916 (9th Cir. 1987).

The Department's regulations define insolvency as an excess of current liabilities over current assets. 9 C.F.R. § 203.10. This definition is consistent with the purpose of the Act to ensure that sellers are paid promptly. *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966). "A financial status where current assets exceed current liabilities is the *sine qua non* of prompt payment." *Id.*

The facts of the instant case demonstrate that the Department's test of insolvency is reasonable and necessary to effectuate the purposes of the Act. During the three months of its insolvency in 1986, Humboldt failed to make prompt payment to sellers in 27 transactions. The testimony of Respondent Lee Mora indicates that drafts and postdated checks were used during that time because Humboldt's working capital was insufficient to permit prompt payment. Lack of working capital is precisely the condition which the Department's regulations concerning insolvency are designed to prevent.

Respondents deny Humboldt was operated while insolvent. They challenge the valuation and classification of certain assets by the Department's auditor.

The values proposed for these assets by respondents, even if accepted, would not alter the fact of insolvency from April 30, 1986, to July 31, 1986, because Humboldt's current liabilities would have still exceeded its current assets. Respondent's argument against the Department's valuation of its assets is therefore unavailing.

Respondents further argue that the allegation of insolvency rests in part upon an improper classification of Humboldt's interest in the Heart Arrow Ranch Partnership herd.

For an asset to be current, it must be one that is held with the expectation of consumption or conversion to cash within one year, (9 C.F.R. § 203.10(b)(1)). Under this applicable definition, Humboldt's interest in the property of the Heart Arrow Ranch Partnership was properly excluded from current assets. The Department's auditor, applying generally accepted accounting principles, classified the interest in this cattle as a long-term investment and not a current asset. The record evidence was consistent with his opinion that the herd was an asset of the Heart Arrow Ranch Partnership not subject to direct liquidation by Humboldt.

Respondents maintain that an oral liquidation agreement between the Heart Arrow partners ensured the ready convertibility of Humboldt's interest in the Heart Arrow herd to cash and its functional equivalence for that reason, to a current asset. Even if convincing evidence had been produced to prove the enforceability of such an agreement, it is fanciful to assume that the herd could be converted to cash so easily and expeditiously that this partnership asset is the equivalent of a current asset owned by Humboldt alone.

## 2. Violations of the Requirement of Prompt Payment

Section 409 of the Act provides that "[e]ach . . . market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative, the full amount of the purchase price." 7 U.S.C. § 228b(a). The time for payment may be extended by written agreement of the parties prior to the transaction. Any such agreement must be disclosed in the records of the buyer and seller. 7 U.S.C. § 228b(b). Any attempt by the buyer to delay payment is an unfair practice in violation of the Act. 7 U.S.C. § 228b(c).

Failure to pay, when due, the full purchase price of livestock constitutes an unfair and deceptive practice, in violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b). *In re George County Stockyard, Inc.*, 45 Agric. Dec. 2342 (1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986); *In re Donald Hageman*, 42 Agric. Dec. 531 (1983).

The use of various devices to delay payment for livestock purchases has been held to constitute an unfair and deceptive practice in violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b). *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. at 590 (issuance of drafts without prior written agreement); *In re Beef Nebraska, Inc.*, 44 Agric. Dec. 2786 (1985), *aff'd sub nom. Beef Nebraska, Inc. v. United States of America, United States*

*Dep't of Agric.*, 807 F.2d 712 (8th Cir. 1986) (issuance of checks drawn on geographically remote banks); *In re C.J. Edwards*, 37 Agric. Dec. 1880 (1978) (issuance of insufficient funds checks); *In re Adolf Sklar*, 31 Agric. Dec. 872 (1972) (issuance of insufficient funds drafts).

Regulations promulgated pursuant to the Act specifically prohibit the use of drafts in livestock purchases without the prior written agreement of the seller. See 9 C.F.R. § 201.43(b).

The evidence in this case shows that Respondent Humboldt Auction Yard, Inc. issued 6 drafts and 27 checks dated after the expiration of the statutory payment period, in purported payment for livestock, without obtaining prior written agreements from the sellers to accept drafts or extend credit. The testimony of Respondent Lee Mora indicates that these instruments were issued in lieu of checks dated within the statutory payment period, in order to delay payment.

The eventual payment of the drafts and checks by Humboldt's bank did not erase the violation. *In re Donald Hageman*, 42 Agric. Dec. at 540; *In re Adolf Sklar*, 31 Agric. Dec. at 882. The livestock industry operates on a cash basis, and the prompt payment requirements of the Act and pertinent regulations are critical to the industry's stability. *In re C.Z. Edwards*, 37 Agric. Dec. at 1887. It is essential to that stability that unlawful practices be stopped in their incipency. Therefore, actual harm need not be shown to prove a violation of the prompt payment provisions. *Bowman v. United States Dep't of Agric.*, 363 F.2d at 85 (quoting *Daniels v. United States*, 242 F.2d 39, 42 (7th Cir. 1957)).

Nor is it relevant that certain sellers gave their oral assent to the arrangements. In enacting section 409 of the Act, Congress implicitly deemed oral agreements to extend the prompt payment period inadequate to protect sellers. Enforcement of the requirement of written agreement, irrespective of actual consent by the seller, is necessary to carry out the will of Congress to impose a uniform preventive regime in this area. *Id.*

### 3. Purchases from Consignment

Insider trading in consigned livestock is expressly prohibited by regulation (9 C.F.R. § 201.56(c)):

No market agency engaged in selling livestock on a commission basis shall purchase livestock from consignments to such market agency for speculative resale, and no such market agency shall permit its owners, officers, agents or employees, or any firm in which such market agency or its owners, officers, agents or employees have an ownership or financial interest to purchase livestock from consignments to such market agency for speculative resale; PROVIDED, That this paragraph shall not be construed to prohibit a market agency from purchasing livestock for its own account to support the market when necessary to protect the legitimate interests of its consignors.

Permitting sales to insiders from consignment for speculative resale is an unfair and deceptive practice, in violation of section 312(a) of the Act (7 J.S.C. § 213(a)). *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. at 390; *In re Smithfield Livestock Market*, 36 Agric. Dec. 1546 (1977).

Given the difficulty, evident throughout these proceedings, of distinguishing the activities of Rudolf Mora as an individual from his activities as a corporate agent, the precise nature of his purchases from Humboldt is uncertain. However, whether Mr. Mora purchased the livestock for his own account or as the agent of Ukiah Auction Yard, Inc., a firm in which he has an ownership interest, Humboldt violated the Act in permitting these transactions to occur.

The evidence adduced in this case supports the conclusion that Mr. Mora's purchases were intended to, and did, support the market for cattle of low quality at Humboldt. However, though the essence of these transactions is consistent with an intent to support the market, their form precludes characterization as market support activity within the meaning of 9 C.F.R. § 201.56(c).

The market support exception to the general proscription of market agency purchases of consigned livestock allows an agency to protect its consignees in circumstances where the bidding does not reflect the true value of the animals. This is consistent with the market agency's fiduciary duty to its consigners. *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 113 (8th Cir. 1972), *rev'd on other grounds sub nom. Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. at 510.

But in a true market support transaction, the market agency itself purchases the livestock for its own account at a price higher than the final open bid. When, however, the agency permits insiders to make purchases of livestock for resale, it "ceases to truly represent its consignors and fails to carry out its duty to obtain the highest possible prices in their behalf." *In re Smithfield Livestock Market*, 36 Agric. Dec. at 1563. Although the facts of the instant case suggest that Mr. Mora purchased the livestock at prices higher than those offered by local bidders, it is uncertain whether those prices were equal to the highest prices which Humboldt could have obtained. Given this uncertainty and the potential for conflicts of interest inherent in transactions of this type, the common sense of the regulations which prohibit them is apparent, and they necessarily must be strictly enforced.

#### 4. Sanction

Respondents contend that the Department is barred from imposing a period of suspension in this case because it has failed to comply with section 558 of the Administrative Procedure Act (APA) which provides in pertinent part: (5 U.S.C. § 558(c)).

... Except in cases of willfulness or those in which the public health, interest, or safety requires otherwise, the withdrawal, suspension or revocation of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given --

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

The application of the provision of the APA to the laws administered by the Department has been considered by the Courts.

A violation of the Act is willful if committed intentionally or with careless disregard of statutory requirements. *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d at 115; *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370 (5th Cir. 1980) (per curiam), cert. denied, 450 U.S. 997 (1981) (violation of analogous prompt payment provisions of the Perishable Agricultural Commodities Act, 1930, 7 U.S.C. § 499a et seq.). The evidence in this case shows that Respondents' actions which violated the act were intentional and thus willful. Therefore, suspension without a prior warning letter is authorized by the Administrative Procedure Act.

Upon consideration of all circumstances in this case, I have concluded that a period of suspension, in addition to a cease and desist order, is warranted and that the reasonable period of time to specify for the suspension, is fourteen days. The 28-day period of suspension requested by complainant would be excessive and unreasonable; it would seriously impair respondents' ability to stay in business and the request was largely based upon complainant's erroneous perception that the sales to Mora were deliberately transacted to allow him to acquire special advantage and profit.

#### Order

Respondents Leland Mora, Rudolf Mora, Jr. and Humboldt Auction Yard, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate device, shall cease and desist from:

- 1) operating Humboldt Auction Yard, Inc., a registrant subject to the Act, while in a condition of insolvency;
- 2) issuing drafts in payment for cash purchases of livestock without obtaining prior written agreements from sellers as to such form of payment;
- 3) failing to pay, when due, the full purchase price of livestock and;
- 4) permitting Rudolf Mora, Jr., or any other owner, officer, agent or employee of Humboldt, or any firm, such as Ukiah Auction Yard, Inc., in which Humboldt or its owners, officers, agents or employees have an ownership or financial interest, to purchase livestock on consignment for resale.

Respondent Humboldt Auction Yard, Inc. is suspended as a registrant under the Act for a period of fourteen days.

This Decision and Order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service.

Copies hereof shall be served on the parties.

[This Amended Decision and Order became final May 5, 1989.-Editor]

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**In re: HERMISTON LIVESTOCK CO., CHARLES R. ROSENBERG and TERESA J. ROSENBERG, APPLICANTS-RESPONDENTS; and GARY MILLER, d/b/a NORTHWESTERN LIVESTOCK COMMISSION CO. and NORTHWESTERN LIVESTOCK COMMISSION CO.**

P&S Docket No. D-89-46.

Ruling on Certified Question filed April 6, 1989.

Ben E. Bruner, for Complainant.

Robert Cook, for the Rosenbergs.

Daniel Olsen, for Gary Miller.

*Ruling on Certified Question issued by Donald A. Campbell, Judicial Officer.*

On March 31, 1989, Administrative Law Judge Paul Kane certified to the Judicial Officer the question as to whether a motion to dismiss should be granted as to Gary Miller and his corporation. I agree with the ALJ's recommendation that the motion to dismiss be denied. The Judicial Officer, as well as the ALJ, is bound by the Rules of Practice, which state that "[a]ny motion will be entertained other than a motion to dismiss on the pleading" (7 C.P.R. § 1.143(b)(1)). If I had discretion to entertain the motion, I would deny it for the reasons stated by the ALJ.

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**In re: SAMUEL HABIB, INC., d/b/a H&H CATTLE CO., and SAMUEL E. HABIB.**

P&S Docket No. 6878.

Supplemental Order filed April 13, 1989.

Andrew Y. Stanton, for Complainant.

Respondent, Pro se.

*Supplemental Order issued by Dorothea A. Baker, Administrative Law Judge.*

On February 29, 1988, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondents as registrants under the Act for a period of five years and thereafter until they demonstrate that the corporate respondent is no longer insolvent. The order provided, among other things, that the suspension may be modified upon application to the Packers and Stockyards Administration to permit the individual respondent's salaried employment by another registrant or packer after expiration of a one year period of suspension.



e year of the suspension period has expired, and the individual det., Samuel E. Habib, has applied to the Packers and Stockyards istrations for a modification of his suspension, permitting his ment with a registrant under the Act. Accordingly,

IS HEREBY ORDERED that the suspension provision of the Order February 29, 1988, is modified to permit Samuel E. Habib to be yed by a registrant under the Act, with the Order remaining in effect in er respects. The Order shall remain in full force and effect in all other is.

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ERNEST C. SMITH, III, BETTY J. JONES, and JOANN SMITH S, d/b/a SMITH BROTHERS LIVESTOCK YARD; and WESLEY G. EHEAD.

Docket No. D-88-83.

emental Order filed April 13, 1989.

r. Trust, for Complainant.

N. Jones, for Respondents.

emental Order issued by James W. Hunt, Administrative Law Judge.

n March 9, 1989, an order was issued in the above-captioned matter, i, *inter alia*, suspended respondents Ernest C. Smith, III, Betty J. Jones, oAnn Smith Evans as registrants under the Act for a period of 30 days thereafter until the partnership demonstrates that any deficit in its dial account has been eliminated.

he deficit in the custodial account has been eliminated. Accordingly, IS HEREBY ORDERED that the suspension provision of the order d March 9, 1989, is terminated. The Order shall remain in full force and t in all other respects.

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1: JAY C. DAVIS, d/b/a JAYCO CATTLE CO.

Docket No. D-88-60.

lemental Order filed April 17, 1989.

rd M. Silverstein, for Complainant.

ndent, Pro se.

emental Order issued by Victor W. Patner, Chief Administrative Law Judge.

On August 25, 1988, an order was issued in the above-captioned matter, th, *inter alia*, prohibited the respondent from becoming a registrant under Packers and Stockyards Act, as amended and supplemented (7 U.S.C. § et seq.) for five years and thereafter until he demonstrates that he plies with the bonding requirements of the Act and the regulations issued uant thereto. The order, also, provided that, after the expiration of a -day period, it could be modified to allow respondent's salaried oloyment by a registrant under the Act. Respondent now has requested

that the order be modified as indicated above, and the complainant has indicated that it has no objection to the modification.

Accordingly, the Order of August 25, 1988, is modified to allow respondent's salaried employment by a registrant under the Act. The Order shall remain in effect in all other respects.

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**In re: HUTTO STOCKYARD, INC., JOHN D. HUTTO, and CHARLES L. HUTTO.**

**P&S Docket No. 6933.**

**Decision and Order filed April 19, 1989.**

**Check weighing and direct sales investigatory techniques - Motive for short weighing - Sanction policy.**

The Judicial Officer affirmed Judge Bernstein's order requiring respondents to cease and desist from weighing livestock at other than true and correct weights (and various related practices), and from failing to issue scale tickets in conformity with the regulations. Respondents are suspended as registrants for 90 days and are jointly and severally assessed a civil penalty of \$20,000. A suspension order should apply to the individual respondents who direct and control the corporate respondent, as well as to the corporate respondent. Complainant need only prevail by a preponderance of the evidence. Findings of fact by ALJs are given great weight by the Judicial Officer. Correct weighing procedure described. Check weighing and direct sales investigatory techniques described. Reweighing livestock is not ordinarily part of a direct sales investigation. Complainant is not required to prove a motive for short weighing, but any dealer buying hogs and reselling them to a packer on the original purchase weights has a motive for short weighing. I infer that respondents intentionally short weighed the hogs at issue here, but the sanction would be the same irrespective of whether respondents' violations were intentional. Serious nature of false weighing explained. Sanctions in false weighing cases summarized. Severe sanction policy explained, and recent severe sanctions under the Packers and Stockyards Act summarized. A reduced sanction is imposed here because the suspension order also affects respondents' auction yard, which was not involved in the weighing violations at respondents' buying station. The great number of prior warnings for similar violations is an aggravating circumstance, irrespective of whether prior violations actually occurred. The civil penalty criteria at 7 U.S.C. § 213(b) are not applicable in determining suspension orders. Willfulness is not required where warning letters were sent, but violations were willful irrespective of whether they were intentional.

Dennis Becker, for Complainant.

Daniel W. Olsen and C. Bradley Hutto, for Respondents.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).<sup>1</sup> An initial Decision and Order was filed on October 28, 1988, by Administrative Law Judge Edwin S. Bernstein (ALJ) ordering respondents to cease and desist from weighing livestock at other than true and correct weights (and various related practices), and from failing to issue scale tickets in conformity with the

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<sup>1</sup>See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1989 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Hall, *Agricultural Law*, ch. 71 (1980).

ulations. Respondents are suspended as registrants for 90 days and are civilly and severally assessed a civil penalty of \$20,000.

On December 16, 1988, respondents appealed to the Judicial Officer, to the final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>2</sup> This case was referred to the Judicial Officer for decision on March 1, 1989. Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, with a few trivial changes. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

### ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This administrative proceeding under the Packers and Stockyards Act, 1, as amended (7 U.S.C. § 181 *et seq.*) ("the Act"), was instituted by a Complaint filed on August 21, 1987, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture. The Complaint charges that the corporate Respondent was engaged in the business of selling livestock in commerce on a commission basis, and was engaged in the business of buying and selling livestock in commerce for its own account and the accounts of others, within the meaning of and subject to the provisions of the Act; and that the individual Respondents were partners and officers of the corporate Respondent, and formulated, directed and controlled the policies, practices and activities of the corporate Respondent. The corporate Respondent, under the direction, management and control of the individual Respondents, was alleged to have weighed stock at less than their true and correct weights, to have issued scale tickets and accounts of purchase on the basis of the false weights, and to have sold livestock on the basis of such false and incorrect weights. In addition, Complainant alleges that the corporate Respondent, under the direction, management and control of the individual Respondents, issued scale tickets which did not comply with requirements regarding their contents, failed to maintain and operate a scale so as to maintain accurate weights, and failed to weigh livestock in strict conformity with the requirements of the regulations.

Respondents filed an Answer on September 14, 1987, in which they denied Complainant's essential allegations of violations. A hearing was held before in Charleston, South Carolina. Complainant called four witnesses, and introduced 33 exhibits ("CX"). Respondents called 18 witnesses, and introduced nine exhibits ("RX").

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<sup>2</sup> The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in U.S.C. app. at 1068 (1962). The Department's present Judicial Officer was appointed in May 1971, having been involved with the Department's regulatory programs since 1949, including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the actions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program (December 1962-January 1971).

The parties filed proposed findings of fact, proposed conclusions of law and briefs. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

### Findings of Fact

1. Respondent Hutto Stockyard, Inc. (the corporate Respondent), is a South Carolina corporation with its principal place of business at Holly Hill, South Carolina. Its business mailing address is Route 1, Holly Hill, South Carolina 29059. It was founded in 1948 and has been continuously operated by the Hutto family since that time.

2. The corporate Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Hutto Stockyard, Inc., a posted stockyard subject to the Act ("the stockyard");

(b) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard;

(c) Engaged in the business of buying and selling livestock in commerce for its own account and the accounts of others; and

(d) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to buy and sell livestock in commerce on a commission basis.

3. Respondent John D. Hutto is an individual whose business mailing address is Route 1, Holly Hill, South Carolina 29059.

4. John Hutto is, and at all times material herein was, president and owner of 33% of the corporate Respondent and does and did at all times material herein, in combination with Respondent Charles L. Hutto, formulate, direct and control the policies, practices and activities of corporate Respondent.

5. Respondent Charles L. Hutto is an individual whose business mailing address is Route 1, Holly Hill, South Carolina 29059.

6. Charles Hutto is, and at all times material herein was, vice president and owner of 33% of the corporate Respondent and does and did at all times material herein, in combination with Respondent John Hutto, formulate, direct and control the policies, practices and activities of corporate Respondent.

7. The corporate Respondent has two business locations. It operates an auction yard in Holly Hill, South Carolina ("Holly Hill") and a buying station in Manning, South Carolina ("Manning"). (TR 297-98)

8. Charles L. Hutto and his son, Bartley L. Hutto, weigh livestock at Manning. (TR 306-07) Each filed a statement that he had read and agreed to abide by weighing regulations issued by Complainant. (CX 11, 12, 13, 14)

On April 1987, a team of investigators of the Packers and Stockyards station, led by Dr. David K. Auten, III, investigated the weighing at Respondents' Manning buying station. (TR 81-85) They followed standard direct sale investigative techniques. (TR 77-81; CX 15)

On the morning of Sunday, April 12, 1987, 13 hogs previously fed by Complainant and lodged at Walterboro, South Carolina, were off feed. At about 3:00 P.M., that afternoon, they were taken off water. The hogs were divided into groups of six and seven, and individually identified. They were moved around to help reduce their weights, weighed on a truck, and placed in a dry pen without feed and water. At 7:00 P.M., the hogs were weighed around for another 15 minutes to further stimulate the excretion of water and urine. In the early morning of April 13, 1987, the hogs again were weighed around. Each hog was then reweighed individually on the truck. The first group was reweighed between 5:52 A.M. and 6:00 A.M.; the second group between 6:03 A.M. and 6:12 A.M. The hogs had lost weight. The hogs were then placed into the two groups on the truck and driven 71 miles to a location near Respondents' Manning buying station. (TR 81-88)

Complainant's representatives then rechecked the truck scale and found it accurate. (CX 16) They reweighed the first group of six hogs individually between 8:38 and 8:43 A.M. and recorded their weights. (CX 17) They placed these hogs in the back of a pickup truck which contained a bed of straw. The hogs were gaunt (shrunken out) when placed on the truck. Mr. Auten drove the truck 5.1 miles to Manning and arrived at 8:55 A.M. When he loaded the truck at 9:10 A.M., he found the straw to be free of urine. (TR 88-99)

Charles Hutto was Manning's weighmaster. Mr. Auten observed Hutto operate the scale as he weighed hogs ahead of those Complainant brought to sell. Auten noted that Hutto was weighing hogs with weight in the scale's poise. He observed that Hutto did not balance the scale. He noticed that Mr. Hutto always weighed the hogs and printed the scale tickets while the indicator needle was on the lightweight side of the target area.

The six hogs that Complainant sold were weighed in three drafts, one individually, four together, and another individually. (CX 20) Their weights were 11, 18, and 11 pounds lighter, respectively, than when Complainant weighed them about 45 minutes earlier 5.1 miles away. (CX 29) Hutto weighed them at 9:22, 9:23 and 9:24 A.M. (CX 29) Auten observed two of three drafts on the load as Hutto weighed them. He noted that the indicator's needle never vacillated below the target area, and the weight was added when the needle was above the target area. He also observed that in all three cases, the ticket was in the poise when the hogs were weighed. (TR 9, 584-86; CX 22, 29, 30)

1. Auten noted that "Instructions for Weighing Livestock" were posted on the wall of the scale house. (CX 19; TR 112-13) The temperature at the time the weighing was between 75 and 80 degrees Fahrenheit.

3. After the weighing and the sale was completed, Hutto gave the scale tickets and a check to Auten. The scale tickets did not contain the date of

weighing, the weighmaster's initials or name, and the scale ticket was for Respondents' Holly Hill rather than Manning location. (TR 113; CX 20)

14. Because of the discrepancies in weights, Complainant's representative decided to continue their investigation. They reverified the truck's scale for accuracy and reweighed the other seven hogs individually on the truck between 10:27 and 10:34 A.M. The truck was then 5.1 miles from Manning. They found the truck to be free of feces and urine. They then reloaded the hogs on the pickup truck which Auten and Ben Baird drove to the Manning buying station. They arrived at 10:46 A.M. The hogs were unloaded, and were weighed between 10:57 and 10:59 A.M. When the hogs were unloaded, Auten and Baird checked the back of the truck, and found it free of urine and feces. Auten and Baird went into the weighing shed, and watched Charlie Hutto weigh hogs of others. (TR 113-22; CX 23, 25, 26, 29, 30)

15. Hutto weighed Complainant's hogs in two drafts. He had the scale ticket in the poise before he weighed each draft. He also closed the trig loop which locked the weight while the balance indicator was on the low weight side of the target area. He weighed six hogs in the first draft, and a single hog in the second draft. (TR 122-24)

16. Baird and Auten concluded that the hogs had been shortweighed. Baird left the scale area to get the Departmental test weights. After Complainant's second draft was weighed, Hutto gave Auten the two scale tickets and a check. The scale tickets lacked the date of weighing, the weighmaster's initials, and did not accurately reflect where they were weighed. The six hogs weighed 1,390 pounds whereas Complainant had weighed them less than a half hour earlier at 1,412 pounds. The one hog weighed 200 pounds, whereas 25 minutes earlier Complainant had weighed it at 204 pounds. (TR 122-27; CX 24, 25, 26, 29, 30)

17. Auten and Baird introduced themselves to Hutto, and advised him that they wished to check his scales. They found that the scale was back-balanced by two pounds, so that it weighed two pounds light. They then arranged to check the accuracy of the scale at weights up to 1,400 pounds. They found the scale was inaccurate. They also found that the ticket in the poise caused an automatic weighing of two pounds too light at various weights. When they discussed this with Hutto, he mentioned that he had noticed straw in the poise. When they disassembled the poise, they found a dried mouse, some straw, grass, grains and acorns. After they removed these things from the poise, they retested the scale and found it to be within allowable tolerances. (TR 127-38, 207-25; CX 27, 28, 29, 30)

18. During each of the five weighings of Complainant's hogs, the three drafts in the first load and the two drafts in the second load, Hutto had a scale ticket in the scale's poise. This caused a two-pound underweight in each instance. In each instance, the scale was probably out of balance which resulted in an additional underweight.

19. Raymond Shorter of the South Carolina Department of Agriculture testified that his department checks the scales at the Respondents' place of business in Manning, S.C., every six months. These checks are quite similar to those performed on the scales by Complainant's employees on April 13, 1987. The last check made by the South Carolina Department of Agriculture

prior to April 13, 1987, was made less than one week earlier on April 8, 1987, and after the prior week's sale on April 6, 1987 (TR 262). The results of this check were compiled on RX 1 and show that Respondents' scales were weighing within the prescribed limits.

20. Dr. Ann Hurst, D.V.M., testified that at a temperature of around 68 degrees or above, hogs will experience a greater transpiratory loss. Dr. Hurst testified that the temperature in an open truck on the hogs' backs with the sun shining would be higher than the temperature outside (TR 421-422). She further stated that transpiratory loss always occurs and will always be measurable (TR 420-421). Dr. Hurst also testified that transportation, strange surroundings and strange smells stimulate hogs to urinate or defecate and that a loss by excretion would not necessarily be seen in the pickup truck's straw because straw is so absorbent. (TR 412)

21. [Omitted.]<sup>3</sup>

22. Numerous witnesses testified that the Hutto family and the business have an outstanding reputation for honesty and integrity in the livestock industry and in the community. These character witnesses ranged from small-scale farmers who sold only a few animals to livestock producers who sold thousands of hogs over the course of years. Respondents' character was also attested to by buyers and by community leaders, including the sheriff of a county in which the citizens sold livestock to Respondents and the President of the Medical University of South Carolina and former Governor of the State of South Carolina.

23. On the following occasions, beginning in 1960, Complainant's representatives had advised Respondents about the importance of maintaining accurate weights. In September 1960, the Packers and Stockyards Administration sent a letter to the corporate Respondent explaining what information is required to be placed on a scale ticket. (CX 1) It further discussed this subject in its letter of December 15, 1961. (CX 2) By letter dated August 1, 1967, Complainant notified Respondents about certain practices which violate the Packers and Stockyards Act. The practices included inadequate scale tickets. (CX 3)

24. On April 12, 1972, Complainant's representative visited Respondents' Holly Hill auction yard. In a letter dated April 26, 1972, Complainant advised Respondents that the scale tickets were not properly completed and noted that during the visit the matter had been discussed with John Hutto. (TR 25-28; CX 14A)

25. On May 15, 1973, Complainant's representatives visited Holly Hill. They reweighed some hogs which were previously weighed, and also checked the use of the scales and scale tickets. In a letter dated June 5, 1973, the Packers and Stockyards Administration notified Respondents that hogs were not weighed accurately, scale tickets were not properly filled out, and the scale's zero balance was not being verified every 15 minutes or 15 drafts. (TR 28-32; CX 4) John Hutto responded on July 9, 1973, saying corrective measures had been taken. (CX 5)

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<sup>3</sup>The omitted sentence states: "There is no evidence that Respondents received financial gain or improved standing with buyers or sellers as a result of alleged misweighing."

26. Complainant's representatives again visited Holly Hill on September 11, 1973, to reweigh hogs and check scale tickets. By letter dated October 2, 1973, Complainant advised Respondents that Respondents had not weighed the hogs properly and had failed to fill out the scale tickets properly. (CX 6)

27. On April 30, 1974, Complainant's representatives again visited Holly Hill. In a letter dated May 23, 1974, Complainant advised Respondents that some of the hogs had been misweighed. The letter also stated that the problem had been discussed with John D. Hutto and Charles Hutto. (CX 7) In a letter dated May 29, 1974, Respondents advised Complainant that corrective action had been taken. (CX 8)

28. In June 1976, Complainant's representatives again visited Holly Hill. They found weighing problems, a malfunctioning scale, and a printing device that was not working, as a result of which handwritten entries had to be made on the scale tickets. Complainant's representatives talked to Charles Hutto and John Hutto about the problems. (TR 36-37)

29. Complainant's representatives again visited Holly Hill on October 12 and 14, 1976. (TR 37-41) In a letter dated November 10, 1976, Complainant notified Respondents that some animals had not been weighed properly by Respondents, and that scale tickets had not been properly filled out. (CX 9) In a letter dated November 17, 1976, Respondents stated that they were correcting the problems. (CX 10)

30. Complainant's representative, Mr. Pichard, visited Respondents' Manning buying station in April 1978. He checkweighed hogs and found some weight discrepancies, as well as five-pound back-balancing of the scales. He talked with Charles Hutto, and learned that the scale ticket was put in the poise prior to determining the weight of the livestock. Mr. Pichard advised Mr. Hutto that this should not be done. A second visit was made to Holly Hill later that week (TR 41-42), and in November 1978. (TR 42)

31. In February 1982, Mr. Pichard visited the auction yard. He found that cattle were being weighed properly, and complimented Respondents for this.

### CONCLUSIONS OF LAW

1. Respondent, Hutto Stockyard, Inc., is a corporation which, in April 1987, was engaged in the business of buying and selling livestock in commerce for its own account and for the account of others, and was a dealer within the meaning of and subject to the provisions of the Act. During April 1987, it was registered with the Packers and Stockyards Administration.

2. Respondents John D. Hutto and Charles L. Hutto are individuals who, in April 1987, were part owners and officers of the corporate Respondent. They were individually and jointly responsible for the direction, management and control of the corporate Respondent.

3. Careless or deliberate false weighing is an unfair and deceptive practice under the Packers and Stockyards Act. *In re Jake Muehlenthaler & Son, 37 Agric. Dec. 313* [aff'd mem., 590 F.2d 340 (8th Cir. 1978)]; *In re Gary Chastain and Jim Lewis d/b/a C&L Stockyards*, 47 Agric. Dec. \_\_\_\_ (1988), [aff'd per curiam, 860 F.2d 1086 (8th Cir. 1988) (unpublished)]; 1 *Agricultural*



*Law* (J. Davidson Ed. 1981), Ch. 3, § 3.63; Donald A. Campbell, "The Packers and Stockyards Act Regulatory Program."

4. On April 13, 1987, Complainant's representatives "shrunk" and weighed 13 hogs which were weighed between 30 and 46 minutes later by Respondents in five lots. Complainant's weights were greater than Respondents' weights as follows:

Lot No.	No. of Hogs	Complainant's Weight	Respondent's Weight	Discrepancy in Pounds
1	1	401	390	11
2	4	813	795	18
3	1	176	165	11
4	6	1,412	1,390	22
5	1	204	200	4

I was impressed by Complainant's test procedures and the credibility of its witnesses and I, therefore, believe that it carefully shrunk and accurately weighed the hogs shortly before the sale.

5. There could have been some transporting loss of weight and some unobserved loss of urine between the time of Complainant's final presale weighing and Respondents' weighing at the time of the sale. However, I conclude that this possible loss of weight was slight and did not account for most of the discrepancies between Complainant's and Respondents' weights.

6. I conclude that, in addition to some transitory loss of weight and unobserved loss of weight due to unobserved urine, the discrepancies in weights were caused by:

a. The dead mouse, straw and acorns that were found in the poise.

It is not disputed that this would cause underweighing;

b. Mr. Hutto's failure to remove the weight ticket from the poise when he closed the trig loop. I believed the testimony of Complainant's witnesses that Mr. Hutto did this and that this would cause underweighing; and

c. Mr. Hutto's failure to allow the indicator needle to sway equally between the light and heavy side of the target area when he closed the trig loop. I also believed Complainant's witnesses when they testified that the needle waived more on the light side than the heavy side of the target area when Mr. Hutto closed the trig loop and that this would account for some underweighing.

7. The above resulted in false weighing by Respondents.

8. Respondents also violated the Act and the regulations by failing to print on the scale tickets the date of weighing, the initials or name of the weighmaster, and that the weighing was being done at the Manning location rather than at the Holly Hill location.

9. . . .<sup>4</sup> [A]s stated in 1 *Agricultural Law* (J. Davidson Ed. 1981), Ch. 1 § 3.63 by the Judicial Officer, "the agency does not have to prove the motive for false weighing."

10. Since warning letters were sent to Respondents, proof of willfulness is not required. 5 U.S.C. § 558(c); *Parchman v. U.S. Department of Agriculture*, 852 F.2d 858, 861 (6th Cir. 1988).

11. Any suspension order in this matter should apply to the individual Respondents as well as the corporate Respondent. *Corn Products Refining Company v. Benson*, 232 F.2d 554, 565 (2d. Cir. 1956); *Bruhn's Freezer Meats v. U.S.D.A.*, 438 F.2d 1322, [1343 (8th Cir. 1971); *Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983, 986 (9th Cir. 1971); *Fred Meyer, Inc. v. F.T.C.*, 359 F.2d 351 (9th Cir. 1966). In *Bruhn's*, the Court explained:

"Clearly an order limited in its application only to the corporate petitioners probably would prove futile as the corporations could be dissolved and the individual petitioners could then, under the cloak of new corporations, engage in the proscribed activities and frustrate the purposes of the Act." P. 1343

12. Complainant has requested that the registration of all three defendants be suspended for one year but that after three months the Holly Hill auction yard be permitted to sell on commission, with the remaining nine months held in abeyance at that location pending compliance by Respondents with the cease and desist order. Complainant also requested that a civil penalty of \$20,000 be imposed. Complainant based this recommendation upon the seriousness of the violations of shortweighing and Respondents' "long history of noncompliance" as well as Respondents' 1986 financial statement.

Complainant's brief (P. 27) stated that the average sanction for weighing violations in recent years has been eight [months] and that it was much more than that in the 1960's but somewhat less in the 1970's.

Respondents asserted that it is against public policy to suspend stockyards, an assertion which I find lacks merit. Respondents cited no authorities as to what sanctions should be imposed if violations are found.

In a recent case, *In re Saylor*, 44 Agric. Dec. 2238, 2636-2660 (1985), the Judicial Officer emphasized the seriousness of false weighing, discussed the importance of assessing strong sanctions and suspended that respondent for eight months. There the respondent had added arbitrary weights by pencil, an act which the Judicial Officer characterized as "one of the most unfair and deceptive practices that can be conducted in violation" of the Act. In *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1838-50 (1975), because a respondent who falsely weighed was quite large it was suspended for 49 days instead of 90 days.

In *In re Parchman*, [46 Agric. Dec. 791 (1987), *aff'd*, 852 F.2d 858 (6th Cir. 1988)], the Judicial Officer affirmed the Administrative Law Judge's decision to assess a \$10,000 penalty and suspend for 90 days. The fact that the

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<sup>4</sup>The omitted sentence and first word of the second sentence state: "It does not appear that Respondents received financial gain from these violations. However,"

suspension order would close the respondent's auction market in another location was considered in suspending the respondent for only 90 days. In that case, it was found that in 20 separate weighings, respondent deliberately falsely weighed animals.

In *In re Upton*, 44 Agric. Dec. 2861 (1985), the Judicial Officer suspended a respondent whose misweighing of hogs was caused by carelessness rather than a defective scale for 28 days and assessed a \$2,500 penalty, reversing the Administrative Law Judge who suspended for seven days and assessed a \$500 penalty.

In *In re Rubel*, 42 Agric. Dec. 800 (1983), the Judicial Officer affirmed the Administrative Law Judge's decision to suspend the respondent for 21 days for increasing purchase weights and the suspension order was applied to both respondent's auction market businesses even though the violations only occurred at one location.

In *In re DuQuoin Packing Co.*, 41 Agric. Dec. 1367 (1982), a respondent who falsely weighed was suspended for 45 days for a single incident involving a back balanced scale.

In *In re Hatcher*, 41 Agric. Dec. 662 (1982), the Judicial Officer affirmed the Administrative Law Judge's decision suspending respondent's registration for six months and assessing a \$10,000 civil penalty where respondent was found to have arbitrarily increased weights and prices and used counterfeit invoices to conceal his fraud in 108 transactions over a six-month period.

In *In re MCM Livestock, Inc.*, 39 Agric. Dec. 893 (1980), the Judicial Officer determined that a respondent who added an arbitrary number of pounds to a scale's weights as well as failed to deposit required amounts to the custodial account and permitted an employee buying livestock to serve as weighmaster should be suspended for 120 days and assessed a civil penalty of \$3,000.

In *In re Unionville Sales Co.*, 38 Agric. Dec. 1207 (1979), the Judicial Officer found that a suspension of 10 days for false weighing was insufficient and stated that a suspension order for at least 30 days and generally larger is appropriate in such cases.

In *In re Collier and Marsh*, 38 Agric. Dec. 957 (1979), [*aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished)], the Judicial Officer affirmed an Administrative Law Judge's decision to suspend for six months where respondent added arbitrary weight to purchase weight.

In *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824 (1979), the Judicial Officer affirmed the Administrative Law Judge's decision to suspend for 14 days a respondent who increased weights by pencil.

In *In re Zelma Wilcox*, 37 Agric. Dec. 1659 (1978), the Judicial Officer increased a suspension to 60 days because of weight padding and insolvency of respondent.

In *In re Muehlenthaler*, 37 Agric. Dec. 313, [*aff'd mem.*, 590 F.2d 340 (8th Cir. 1978)], the Judicial Officer extended a suspension to 30 days because of respondent's false weighing on two dates.

In *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114 (1977), [*aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished)], the Judicial Officer affirmed the Administrative Law Judge's decision suspending respondent for

45 days for false weighing. A similar suspension was affirmed in *In re River Livestock Auction, Inc.*, 36 Agric. Dec. 980 (1977).

In *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552 (1976), [*aff'd curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978)], Judicial Officer extended from seven to 30 days a suspension for false weighing.

In *In re George Townsend*, 35 Agric. Dec. 1604 (1976), a 30-day suspension for false weighing was found not to be unusually severe and was affirmed.

In *In re Braxton M. Worsley*, 33 Agric. Dec. 1547 (1974), the Judicial Officer increased the Administrative Law Judge's 30-day suspension for false weighing to 60 days.

In *In re Trenton Livestock*, 33 Agric. Dec. 499 (1974), [*aff'd per curiam*, F.2d 966 (4th Cir. 1975) (unpublished)], the Judicial Officer affirmed Administrative Law Judge's decision to suspend for 30 days a respondent found to have committed false weighing violations.

The cases also support extending a suspension order to a portion of respondent's business that was not involved in the violations. However, as an extension should be considered in determining the length of the suspension. In *In re Rubel*, 42 Agric. Dec. 800, 804 (1983) and cases cited therein.

I conclude that, in accordance with the foregoing findings of fact and conclusions of law and applicable precedent, all Respondents should be suspended from doing business at both their Holly Hill and Manning locations for a period of 90 days and Respondents should be assessed a fine of \$20,000. Factors that I have considered include:

a. False weighing violations are extremely serious violations and severe sanctions should be imposed to deter Respondents from repeating the violations and to deter other potential violators.

b. Although, in the 1970's, suspensions were not lengthy, the trend has been for this Department to increase the length of suspensions in recent years.

c. I believe that clearly Respondents committed false weighing violations. . . .<sup>3</sup> The mouse and debris in the poise was not intentional on the part of Respondents. . . .<sup>4</sup> However, in any event, they were serious violations.

d. Respondents were warned on previous occasions about the importance of accurate weighing. However, those warnings occurred over eight years before the violations. On the last USDA visit before

<sup>3</sup>The omitted sentence states: "However, I am not necessarily convinced that these violations are intentional rather than due to negligence."

<sup>4</sup>The omitted sentence states: "It is not clear that Mr. Hutto's keeping the ticks on the scale and failure to have the scale balanced in the middle were intentional violations rather than due to negligence." \*

the violations, February 1982, Complainant's representative complimented Respondents for their proper weighing practices.

c. Respondents have an excellent reputation in their community. Although the fact that customers are satisfied and urge the Department to be lenient has been deemed irrelevant (*In re George W. Saylor, Jr.*, 44 Agric. Dec. 2238 (1985)), the evidence is that Respondents have operated a reputable family business and since 1978 there has been no evidence of improper practices.

Taking all of the foregoing into consideration, I reject Complainant's sanction recommendation as being excessively severe. I believe that the sanctions ordered are sufficiently severe to deter Respondents and others but not so severe to be excessive.

#### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend that the evidence does not adequately support the ALJ's findings of fact, but there is much more than a preponderance of the evidence, which is all that is required.<sup>7</sup> Furthermore, the ALJ's findings and conclusions are based, in part, on his evaluation of the credibility of the witnesses. Three times the ALJ referred to his belief in the credibility of complainant's witnesses, stating (Initial Decision at 13-14):

I was impressed by Complainant's test procedures and the credibility of its witnesses and I, therefore, believe that it carefully shrunk and accurately weighed the hogs shortly before the sale.

....

b. Mr. Hutto's failure to remove the weight ticket from the poise when he closed the trig loop. I believed the testimony of Complainant's witnesses that Mr. Hutto did this and that this would cause underweighing; and

c. Mr. Hutto's failure to allow the indicator needle to sway equally between the light and heavy side of the target area when he closed the trig loop. I also believed Complainant's witnesses when they testified that the needle waived more on the light side than the heavy side of the target area when Mr. Hutto closed the trig loop and that this would account for some underweighing.

<sup>7</sup>See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Stradman v. SEC*, 459 U.S. 91, 92-104 (1983); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n. 5 (1981), *aff'd*, 713 F.2d (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1980), No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

I agree fully with the ALJ's evaluation of the credibility of the witnesses. Findings of fact by ALJs are consistently given great weight by the Judicial Officer. As stated in *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 407-09 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988):

The superior advantages of the ALJ, who saw and heard the witnesses testify, for determining their credibility, including determining the expertise and credibility of expert witnesses, is well recognized. As stated in *Great Western Food Distributors v. Brannan*, 201 F.2d 476, 479-80 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953), on appeal from a decision by USDA's Judicial Officer:

Often the "most telling part" of the evidence is not apparent from the printed page, "for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors". *N.L.R.B. v. Universal Camera Corp.*, 2 Cir., 190 F.2d 429, 430. Thus, "we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth." *Ohio Associated Tel. Co. v. N.L.R.B.*, 6 Cir., 192 F.2d 664, 668.

... In addition, the technical and complex nature of the charges made necessitated recourse to extensive use of expert testimony, for here, as is often the case in proceedings under regulatory statutes, the evidence is largely of a dual nature: statistical and parol interpretation of the statistics. In the latter aspect the referee [ALJ] again possesses a greatly advantageous position, for, as the several experts testify, he is able to ascertain their grasp and knowledge, their perspective and understanding of the materials presented to them for interpretation. Their conduct on the stand may enhance or belie their status as experts. In short, anyone who has observed witnesses on the stand will know that those "who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of courts of review who do not enjoy the same advantages." *Jennings v. Murphy*, 7 Cir., 194 F.2d 35, 36.

It would seem, then, that the function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining whether the finder of the fact was justified, i.e. acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings. To go further is to disregard the "most telling part" of the evidence. *N.L.R.B.*

v. Universal Camera Corp., *supra*. With this in mind we approach the proof offered in this proceeding.

Similarly, in *Cella v. United States*, 208 F.2d 783, 788 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), a case involving false weights under the Packers and Stockyards Act, the court stated:

The hearing officer observed these witnesses upon the stand. He was the trier of the facts. The matter of their credibility was for him to decide. *Great Western Food Distributors v. Brannan*, 7 Cir., 201 F.2d 476, 479.

Finally, in *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970), also involving false weights under the Packers and Stockyards Act, the court stated:

When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. *National Labor Relations Board v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952); see also *United States v. Oregon Medical Society*, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

*Accord Blackfoot Livestock Comm'n Co. v. USDA*, 810 F.2d 916 (9th Cir. 1987).

The "hopelessly incredible" rule just quoted is cited with approval by Professor Davis, who states in Davis, 3 *Administrative Law Treatise* § 17.16, at 336 (2d ed. 1980):

When the agency adopts the ALJ's findings, the task of the reviewing court is normally easier; a common note that is struck is that an ALJ's findings adopted by the agency may not be upset unless it is "hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952); *International Union v. NLRB*, 459 F.2d 1329, 1351 (D.C. Cir. 1972) (Tamm, Jr., concurring and dissenting); *NLRB v. Stark*, 525 F.2d 422, 425-26 (2d Cir. 1975), *cert. denied* 424 U.S. 967 (1976); *NLRB v. Columbia University*, 541 F.2d 922, 928 (2d Cir. 1976).

However, Professor Davis makes it clear that an agency is in a different position vis-a-vis an ALJ's findings of fact based on credibility determinations than a reviewing court. He states (*id.* at 327):

Because of the provision of § 557(b) that "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision," the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses, and even despite the hearing officer's observation of the witnesses. The law that had been established before the APA continues: "Even on a question of the credibility of contradictory witnesses, notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner." *NLRB v. Tex-O-Kan Flour Mills*, 122 F.2d 433, 437 (5th Cir. 1941).

Moreover, Professor Davis explains that an agency can overrule an ALJ's findings based on credibility determinations irrespective of whether a very substantial preponderance of the evidence supports the agency's decision. He states (*id.* at 332) that the "orthodox doctrine" consistent with Supreme Court decisions is set forth in *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Quoting from the court's decision rather than the abbreviated version in Professor Davis' treatise (*ibid.*):

The findings of the Commission must be accepted by this court if there is substantial evidence on the record considered as a whole to support them. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The Commission's overruling of the Law Judge's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955). And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); *National Macaroni*, *supra*. If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference. *National Macaroni*, *supra*.

The Commission must consider the initial decision of the Law Judge and the evidence in the record on which it was based. *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 138 U.S.App.D.C. 152, 425 F.2d 583 (1970). But the findings and conclusions of the Law Judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal. *OKC Corp. v. Federal Trade Commission*, 455 F.2d 1159 (10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's



findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra*.

*Accord Blackfoot Livestock Comm'n Co. v. USDA*, 810 F.2d 916, 920-21 (9th Cir. 1987).

As stated above, I agree fully with the ALJ's findings and conclusions. In fact, the evidence is so strong in favor of complainant's position that I would have reversed the ALJ's findings, if he had decided the case otherwise.

Respondents contend that the testimony of complainant's witness, Mr. Auten, might have been influenced by a desire to be promoted, as a result of "success in prosecuting cases" (Respondents' Response to Complainant's Reply Brief on Appeal at 4). As stated above, I agree with the ALJ's determination as to Mr. Auten's credibility. In addition, there is no support for respondents' speculation. Complainant's employees detect enough false weighing that the impetus is in the direction of not bringing a formal case unless the evidence is conclusive. That is why formal actions were not brought on the six previous occasions where inaccurate weighing by respondents was detected (CX 4, 6, 7, 9; Tr. 36-37, 41-42).

Furthermore, Mr. Baird, who jointly conducted the investigation with Mr. Auten, was retired at the time he testified (Tr. 195). Mr. Baird, too, testified that he observed Charles Hutto record the weight of the draft of six hogs referred to in Finding 16 when the indicator needle (or pointer) was about one-half to three-fourths of an inch above the target area, which would cause about 9 of the 22 pounds short weight detected on that draft.<sup>8</sup> He testified (Tr. 226-28):

Q. Would you mind explaining to me how this [CX 30] summary works?

A. Well, I might go to the six butchers down there that I observed the weight on.

Q. Yes, sir.

A. This P&S, it's the next to the last line, it's six butchers, the P&S sale weight is 1,412 pounds. Now, that's the weight that we got on the government on scale before we hauled them this 5 and 1 -- 5.1 miles on the second weighing.

Q. Is that the weight on the government truck?

A. Yes, sir. That's a combination of the weights. These were weighed individually on the government truck.

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<sup>8</sup>A 5-pound weight difference causes the indicator needle to move three-eighths of a (Tr. 202-03).

Q. Right, sir.

A. Six butchers totaled 1,412 pounds. Mr. Hutto purchased these and weighed them at 1,390 pounds with a difference of 22 pounds.

We know that he weighed them with a ticket in the poise, this accounts for 2 pounds, this minus 2 pounds. This leaves a difference of 20 pounds.

We know that the scale was back balanced 2 pounds, this is a minus 2 pounds. This leaves a difference of 18 pounds.

The scale test at this particular point at 1,400 was minus 9 pounds [CX 27]. That is that the extreme error, which is number one in the corner on the first test, we know that all the hogs can't get in one corner, but the most there could be is 9 pounds.

Q. What was the 9 pound error attributable to?

A. That's this mouse error.

Q. Mighty Mouse?

A. Mighty Mouse.

Q. Okay, so what does that leave in the last column?

A. So that leaves 9 pounds difference or 9 pounds that are unexplained.

Q. Which is 9 pounds less weight than the weight at which they were weighed on the government truck?

A. That's correct.

Q. All right. Did you observe the weighing of these six hogs?

A. Yes, sir.

Q. Did you see where the needle was on the indicator when they were -- when the trigger was pulled?

A. Yes, sir.

Q. Where was it?

A. Above the target area.

Q. How far above the target area, do you recall?

A. Approximately a half to three quarters of an inch.

Q. Could that explain the 9 pound differential?

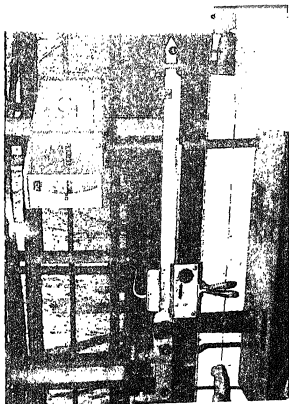
A. Yes, sir.

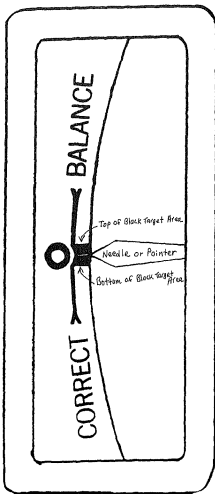
Respondents argue that the ALJ misunderstood how scales operate, and erroneously thought that the needle indicator should come to rest in the dead center of the target area on every occasion (Respondents' Appellate Brief at 4-12). Although the ALJ's language was not always as precise as it should have been, in this respect, e.g., he referred to Mr. Auten's observation that Charles Hutto "always weighed the hogs and printed the scale tickets while the indicator needle was on the lightweight side of the target area" (Finding 11, Initial Decision at 6), when it would have been more precise to have referred to Mr. Auten's observation that Charles Hutto weighed the hogs and printed the scale tickets while the indicator needle was on the lightweight side of the Spinks indicator (i.e., above the black target area of the Spinks indicator), there is no basis for believing that the ALJ was confused as to the operation of the scales. For example, in the paragraph following that just quoted, the ALJ correctly states (Finding 11, Initial Decision at 6):

He [Mr. Auten] noted that the indicator's needle never vacillated below the target area, and the weight was recorded when the needle was above the target area.

Furthermore, although the testimony is not as precise in this respect as desirable, the hearing record shows that complainant's witnesses observed Charles Hutto weigh hogs when the indicator needle (or pointer) was above the black target area of respondents' Spinks indicator, and that the ALJ understood the testimony. A diagram of respondents' type of scale is reproduced on the next page (CX 18; Tr. 100), with the Spinks indicator at the top. A photograph of respondents' scale is reproduced on the following page (RX 6), and a scale drawing of the Spinks indicator is reproduced on the third page following this.







Two indicator needles are shown on the diagram merely to show that the dial moves. In fact, there is only one indicator needle (or pointer). The dial indicator is in a vertical position on the scale. It has a three-eighths inch black target area in the middle. The word "BALANCE" appears on the left side of the indicator (which is the lightweight side), and the word "IMBALANCE" appears on the low side of the indicator (which is the heavyweight side). The three-eighths inch black target area represents 5 pounds of weight (Tr. 188, 202-03, 210), and all livestock must be weighed with the indicator needle or pointer settling somewhere in the black target area (Tr. 234-35, 545-52, 591-94). The indicator needle or pointer will settle at the center of the target area only if the weight of the animal is a multiple of 5. An animal weighing, e.g., 197½ or 202½ pounds could properly be weighed at 200 pounds, even though the indicator needle or pointer settled at top or bottom of the black target area.<sup>9</sup>

The weight on a scale is determined by moving the poise (which consists of the pawl, fractional bar, knurl, and printing handles) to the proper notch on the main bar (the notches are in 100-pound increments), and then turning the knurl on the poise to the proper position, which adjusts the fractional bar to the nearest 5-pound increment (i.e., the fractional bar goes from 0 to 95 pounds). When the indicator needle on the Spinks indicator settles in the black target area, the trig loop latch is closed (locking the beam down), the dial ticket is inserted in the poise, and the printing handles are squeezed which prints the weight on the scale ticket). (The weigher could, after the proper weight was determined, print whatever weight he wanted on the scale ticket (by moving the poise or knurl), but that illegal practice is not involved here.) (Tr. 200-07).

The Instructions for Weighing Livestock (Scales and Weighing Memorandum No. 3), which are published in the Federal Register and were furnished to respondents (CX 11, 12, 14), provide (9 C.F.R. § 1.73-1(b)(1)(i); CX 13, p. 2):

(i) On a weighbeam scale with a balance indicator, the weight of a draft shall be determined by setting the poises at such positions that the pointer will come to rest within the central target area or within ¼ (0.25) inch of the zero mark.

Mr. Baird testified as to the proper weighing of livestock (Tr. 234-36):

Q. Okay, and, Mr. Baird, one of the weighmaster's responsibilities in weighing the hogs is to before he actually makes his determination as to, to -- in the reading, he should get the animals to be as still as possible on the scale, is that right?

<sup>9</sup>A hog weighing exactly 197½ pounds could properly be weighed at either 195 or 200 pounds if a problem arises in this respect unless the weigher manipulates the "break of the beam," i.e., ways weigh borderline cases in his direction.

A. Well, he has to assure himself that that scale has settled to a point where it's accurate; and in order to do that, the livestock have to come to pretty well still.

Q. Okay. What do you mean by the scale settling?

A. Well, it's very difficult for a scale to come to an exact point and hold it for any given time, a beam scale like this, but it will come to an almost stop. In other words, it will only be varying a very little, say an eighth of an inch; and as long as that, it's within the target area when it's varying that much, that's as close as you can get it.

Q. All right.

A. You've assured yourself that you're weighing as close as you can.

Q. All right, and when a -- isn't it true that it's easier for a scale to settle with inanimate weights on it than it is with livestock on it?

A. Oh, absolutely.

Q. And if livestock is moving on the scale and you're waiting on them to settle or waiting on the scale to settle, what is the indicator needle doing?

A. It's moving.

Q. All right, and it would be fluctuating in and out and out or near the target zone?

A. Well, it would be fluctuating, just -- it's according, of course, where you have your poise set whether it's near the target zone or not near the target zone. It's according to how much the animal is moving.

Q. And how many animals are on the scale?

A. That's correct. Certainly one little calf doesn't move it like a Brahma bull does.

Mr. Baird's testimony (Tr. 226-28) that he observed Charles Hutto record the weight of the draft of six hogs referred to in Finding 16 when the indicator needle was above the target area is set forth previously.

Similarly, Mr. Auton testified as to the correct weighing of livestock, and as to Charles Hutto's incorrect weighing, by recording the weight when the indicator needle was above the black target area (on the lightweight side of the indicator), as follows (Tr. 105-11, 122-23, 166-69; see also Tr. 135-36) (emphasis added):



Q. You're still in the observation stage.

A. Yes, still there.

Finally it became time for my hogs to be weighed, and the first pig that was weighed that I was selling was the sow that weighed 401 pounds on our test. I saw Mr. Hutto weigh that hog, and he put the bucket in the poise again before he started to weigh it; and as he, he moved the, the poise out to obtain his weight, he did not come to the right area, which is a part of the indicator on the scale.

When -- at the time he, at the time he arrived at his weight, he closed the trig loop, which locks the beam down.

JUDGE BERNSTEIN: Excuse me, what is that, a trade loop?

THE WITNESS: Trig loop.

JUDGE BERNSTEIN: Trig loop. Where is that on the exhibit CX 18)?

THE WITNESS: That's on the extreme right side just above the beam tip.

JUDGE BERNSTEIN: Oh, yes, okay, trig loop latch. Is that what you mean?

THE WITNESS: Right. It's just a locking mechanism that locks it down.

JUDGE BERNSTEIN: Okay.

THE WITNESS: When he locked it down prior to squeezing the printing handles to imprint the weight on the ticket, the indicator on the scale, which is the very top part of our diagram to the right-hand side, there is a target area in that, in that indicator; and when the animal is properly and accurately weighed, the indicator needle will be in that black target area; and when he weighed mine and put down his trig loop, the indicator was above or to the light side of that target area.<sup>18</sup>

BY MR. BECKER:

Q. You mean light weight side, sir?

<sup>18</sup>As shown below in Mr. Auten's testimony, when he referred to the high side or light side of the target area, he was referring to the indicator or pointer being above the black target area (see, e.g., notes 11, 12, 13, 15 and accompanying text).

A. Light weight side.

JUDGE BERNSTEIN: Okay. Within the target area on the, the exhibit for identification, there are two black pointers --

THE WITNESS: Uh-huh.

JUDGE BERNSTEIN: Would it be between those two black pointers, is that the target area?

THE WITNESS: Well, actually I believe that the two black pointers there are just there to show that the, that the oscillator moves up and down.

JUDGE BERNSTEIN: What would be the target area?

THE WITNESS: To the right-hand side of that there's a little mark right in the center.

JUDGE BERNSTEIN: A little small --

THE WITNESS: A little small rectangle.

JUDGE BERNSTEIN: Yes and that's the target area?

THE WITNESS: Right.

JUDGE BERNSTEIN: Okay, and how far above the target area was the indicator when you observed it at that occasion?

THE WITNESS: I believe, if I remember correctly, he was far enough above it to be entirely in the white or not in the black at all.<sup>11</sup>

JUDGE BERNSTEIN: Now, where is the black and where is the white?

THE WITNESS: That little black, that little black rectangle we mentioned is the black target area.

JUDGE BERNSTEIN: Okay.

THE WITNESS: And everything else behind is white background.

---

<sup>11</sup>This answer shows quite clearly that when Mr. Austen previously testified that the indicator needle "was above or to the light side of that target area" (see text accompanying note 10), he was referring to the indicator needle being completely above the black target area.

JUDGE BERNSTEIN: *Okay, so anything that would not be in that black rectangle or in the black would be in the white whether it's above or below it?*

THE WITNESS: *Right; and either way, if he's above it it's an inaccurate weight and if he's below it it's an inaccurate weight.*

JUDGE BERNSTEIN: *Okay.*

THE WITNESS: *And I not only saw that on the hogs that, that I sold, but I also witnessed the same procedure by Mr. Hutto on, on several of the farmers' hogs I saw him weigh.*

JUDGE BERNSTEIN: *Were those hogs that you observed before your sale?*

THE WITNESS: *Yes.*

...

BY MR. BECKER:

Q. *You had a second sale of hogs -- just jump ahead. Did you see other hogs sold prior to your second sale?*

A. *Yes, yes, I did.*

Q. *What did you notice there?*

A. *The same procedure.*

Q. *All right. Thank you. Please continue, sir.*

A. *Okay. After he weighed my sow, he then weighed the group of four hogs that -- Bartley Hutto was acting that day as the sorting person. He was sorting the hogs prior to going on sale, grouping them according to weight and grade; and, and so the sow obviously was a hog all to her own, just her own identity, that left us with five hogs to sell. Bart, Bartley had separated four of them to be weighed as one and left a light hog which was obviously very light to the left to be weighed by itself; so the second group -- of mine -- -- weighed -- that first sale was the group of the four -- those; but then when he put the head, I observed Mr. Hutto weigh ones I observed of my hogs, he*

*was not in the target area but was on the high or light side of it and he also weighed the last hog in the same way.*<sup>12</sup>

JUDGE BERNSTEIN: Okay. The sow was the one that you had previously weighed at 401?

THE WITNESS: 401.

JUDGE BERNSTEIN: And which one was the last hog?

THE WITNESS: The last hog was the one right below the sow, weighed 176 pounds on Exhibit 17, page one of two.

....

A. Okay. Again, as I did before, when I unloaded the [second load of] hogs, I drove the truck to the parking area and Mr. Baird and I both got out; and before we walked over to the buying station, why we both looked in the back end of the truck; and again there was no, there was no feces or the straw was not wet.

We then proceeded over to the scale house area of the buying station and watched Mr. Hutto weigh some hogs that were brought in by the farmers in front of me as well as watched him weigh the hogs that I had just consigned for sale.

Q. Now, did Mr. Baird go into the house with you?

A. Yes, he did.

Q. All right, so testify as to your knowledge, sir. Please continue.

A. After I got into the house, into the scale house area, when it came time to weigh our hogs, they were weighed in a draft containing six hogs and then a single draft of one hog.

*The six hogs were weighed first. I witnessed Mr. Hutto weigh this group of hogs; and again as he did earlier in the morning, he weighed them with the scale ticket in the poise and he closed the trig loop before the balance indicator was in the black target area; and again it was on the high side or the light side of the target area.*<sup>13</sup>

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<sup>12</sup>Here, again, Mr. Auten makes it clear that the indicator needle "was not in the target area" at all, but, rather, "was on the high or light side of it. . . ."

<sup>13</sup>Here, again, Mr. Auten makes it clear that Charles Hutto determined the weight "before the balance indicator was in the black target area," and that instead of being in the black target (continued..)

....

Q. What happened with respect to the weighing of the second hog, the one hog?

A. The one hog was weighed, again with the scale ticket in the vice; but this time when he had arrived at his purchase weight, the indicator was in the black. When he closed the trig loop down, it was in the black area, target area when he closed the trig loop and printed his ticket.<sup>14</sup>

....

Q. I believe you testified on your direct examination that as you were watching the weigh procedure you said that the needle was not in the target area; and I believe you said, "I don't think it was entirely in the white." Can you tell me where it was?

A. I think I said entirely in the black.

Q. Okay, so -- well, are you saying that it was not entirely in the black or it was, it was in the white?

A. It was not in the black, yes.<sup>15</sup>

Q. Okay. Now, how -- where was it?

A. It was, it was above, it was on the high side above the black central target area.

Q. All right.

A. It was above that half an inch, three-quarters of an inch, whatever. I --

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<sup>14</sup>(...continued)  
1. It was "on the high side or the light side of the target area." In addition, Mr. Baird also testified that this draft of six hogs was weighed when the indicator needle was about half to three-quarters of an inch above the black target area (Tr. 226-28, quoted above).

<sup>15</sup>This hog was weighed by P&S at 204 pounds and by Charles Hutto at 200 pounds, a difference of 4 pounds (CX 29). The 2-pound back-balanced scale would account for 2 pounds of short weight, and the scale ticket in the photo would account for 2 pounds of short weight ending 17; and see Tr. 226-27), which is consistent with Mr. Austen's observation that this hog was weighed in the black target area.

<sup>16</sup>This answer and the following five answers show clearly that Mr. Austen observed Charles Hutto weigh the hogs when the indicator needle was not in the black target area at all, but, rather, when it was above the black target area.

Q. Well, I mean, you're saying "whatever", that's what I'm trying --

A. All right.

Q. I got the input from your direct testimony that it was just above the black. Are you saying it was way up or way down?

A. No. *I'm saying it was above the black so you could see white on either side of that indicator.*

Q. Okay.

A. Now, sometimes when I was watching him weigh -- I mean it wasn't all the same every time. *I watched him weigh hogs other than my own too, and sometimes it was maybe an inch or more above the black, other times it was right close to the black and sometimes it was right in the black.*

Q. All right. Now, when there was more than one hog on the scale or even if there is one big hog on the scale moving around, even if you're close to the right weight that needle is going to be moving, isn't it?

A. It will move a little bit, sure will, if the hog is moving.

Q. If the hog is moving?

A. Yeah.

Q. And because the scale only weighs in 5 pound increments, just the law of averages are going to be, I guess, only one in five times could you even if you tried get it right on the exact weight?

A. I, I don't know what to think about the law of averages; but given enough, given enough time eventually, *eventually you can, you can weigh to the target, you can weigh the target area every time.*

Q. *I'm, I'm not talking about target area now, I'm talking about the zero line.*

A. *Oh, that little white line?*

Q. *That white line right in the middle. On some hogs it would be impossible to hit that white line because given the 5 pound increments --*

A. *I see. Yes, okay, I see, you're right.*

Q. So sometimes if the hog is closer to the next 5 pound increment below it, it's going to be on the high or low side of the target area?

A. But it will still be in the black.

Q. All right. That black area designates a five pound range, is that right?

A. That's correct. It's a little -- that's correct.

Q. And then so would it be, it would be accurate to say that the white line in the middle of the 5 pound target zone would be two and a half pounds -- at the two and a half pound mark?

A. It would be two and a half pounds above it and two and a half pounds below it to stay in the black.

....

Q. . . . When you sold hogs on both times you made sales on April 13th, did you have occasion to look at the Spinks indicator as Mr. Charles Hutto weighed the hogs?

A. Yes, I did.

Q. For how many of the drafts which he weighed did you look at the Spinks indicator?

A. On my sales for my own hogs?

Q. Yes, sir.

A. I looked at it on two drafts on the first load and both drafts on the second load.

Q. And did you ever see the needle of the indicator drop below the target area as he was preparing to pull the trigger to stamp the weight?

A. No, I did not.

Q. What did you see?

A. As he was closing the trig loop and preparing to print the weight, on three occasions the indicator was on the high side of the target area and on the fourth occasion it was in the target area.<sup>16</sup>

Q. Now, on all those occasions was the indicator still fluctuating?

A. It was coming -- yes, it was coming down as he was rolling out his poise to attain his weight.

Q. Would it fluctuate below the target area?

A. No, it did not.

Q. How about with respect to all the sales of hogs by other farmers where you were looking at the Spinks indicator?

A. On the ones that I watched, the same was true for them. I did not see it come below the, below the target area.

Q. *What you saw was that the needle would be either in the target area or above the target area, is that correct?*

A. *That's correct.*

MR. BECKER: I have no further questions.

#### CROSS-EXAMINATION

BY MR. C.B. HUTTO:

Q. Mr. Auten, the, as the hogs were being weighed and the -- he was fine tuning the weight by moving the poise, the needle would be fluctuating, is that correct?

A. Yes, it would be moving up and down. It would be fluctuating.

Q. As I understand it, you're just saying the low point in the fluctuation was either -- didn't go below the target zone, as I understand it?

A. That's right.

Q. Okay, and the high point of the fluctuation, or you said the fluctuation was on the high side of the target zone?

A. Correct.

MR. C.B. HUTTO: I don't have any further questions.

MR. BECKER: I have no further questions.

JUDGE BERNSTEIN: I'm a bit confused.



# EXAMINATION

BY JUDGE BERNSTEIN:

Q. How many times did you observe the poise in connection with first group of hogs that you sold in connection with the test sale?

A. With our first sale?

Q. Yes.

A. I saw it two times.

Q. When was the first time?

A. First time I saw him weigh the sow, which was the first draft.

Q. Okay. Now, on the sow, what did you see with respect to the fluctuation of the needle and the poise?

A. It was always on the high side of the target area.<sup>17</sup>

Q. And at the time he closed --

A. The trig loop.

Q. -- the trig loop, where was it fluctuating?

A. On the high side of the target area.

Q. But it was in the target area?

A. No, it was not. It was above the target area.<sup>18</sup>

Q. It was fluctuating at times above the target area but never below the target area?

A. It never --

Q. Fluctuating from the white above to the black in the target, is that what you're saying?

---

<sup>17</sup>Mr. Auten's third answer below shows clearly that his reference to the "high side of the target area" means "above the target area," as distinguished from "in the target area" (see note 18, *infra*). See also text accompanying note 11 and note 19 referring to the same sow.

<sup>18</sup>This answer shows quite clearly that Mr. Auten's references to Charles Hutto's weighings "on the high side of the target area," or the "right side" of the target area, mean "above the target area."

*A. Yes, but on the sow all its fluctuations were above the black area.<sup>19</sup>*

*Q. It was completely out of the black?*

*A. Yes, sir.*

*Q. Fluctuating in the white above the black?*

*A. Yes, sir.*

*Q. At the time he closed the trig loop?*

*A. Right.*

*Q. What was the next time you observed it?*

*A. The next draft he weighed was four hogs, which I did not see; and then the third draft was a single hog, which I saw.*

*Q. What did you see with respect to the single hog?*

*A. Very much the same as it was with the sow. All the fluctuations were at the top of the black target area or above when he closed.*

*Q. So it was fluctuating from where to where?*

*A. From the top line on the black target area.*

*Q. That was the --*

*A. That was the low point, and from there up was the high point. The high point was something above that.*

*Q. So it was fluctuating mostly in the white and occasionally touching the black?*

*A. Occasionally touching the black.*

*Q. The top of the black?*

*A. Yes; and then when he closed the trig loop, it was in the white.*

*Q. Okay, and when was the next time you observed it?*

---

<sup>19</sup>This answer and the next three answers show clearly that Mr. Auten observed the first sow being weighed while the indicator needle was above the black target area.

A. *The next time was the first draft of our second load, I believe it was a six head; and in that instance it was very similar to the first two times, first two observations I made; and again when the trig loop was closed, the indicator was in the white.*

Q. *Fluctuating in the white?*

A. Yes, sir.

Q. And then you saw it one more time?

A. I saw it one more time, and that was the light hog that was weighed very last; and that one was fluctuating from approximately the -- well, that one actually fluctuated from the lower half of the target area to just slightly above the line on the high side of the target area.

Q. Okay, so that was almost all in the target area?

A. Right.<sup>20</sup>

Q. Just slightly fluctuating in the white above the target area?

A. Yes, sir.

Q. Okay. Did you observe -- and you observed it on other occasions that they -- when other customers, other sellers' hogs were being weighed?

A. Yes, sir, I did.

Q. How many other occasions?

A. Three or four other times.

Q. And where was it?

A. Maybe -- no more than five.

Q. Where was it on those occasions?

A. On those occasions it was always fluctuating on the high side. Sometimes it was in the high side of the black, but on the low -- the low points of its oscillation; but, of course, the upper points of its oscillation would be up in the white area.<sup>21</sup>

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<sup>20</sup>See note 14 as to the weighing of this hog.

<sup>21</sup>See note 22, *infra*.

Q. So it was fluctuating into the white area above the black part of the target area?

A. Yes, it was.

JUDGE BERNSTEIN: Okay. Thank you.

MR. C.B. HUTTO: May I have a followup on that?

JUDGE BERNSTEIN: Yes, of course.

#### CROSS-EXAMINATION

BY MR. C.B. HUTTO:

Q. Mr. Auten, if -- and let me see if I understand this -- if the weight on the scale is such that it's continually moving and it's not going to come to a complete rest, would the fluc -- the fluctuation if the, if you've got it on the correct pulse setting, it's going to get you the closest weight to zero, assuming that you've done that, the actual fluctuation should be within a 5 pound range, is that right, because you're, you're only adjusting by 5 pound increments?

A. If, if you have a correct SR, it should not be -- well, all else being equal, absence some sudden jerks or something like that, which would of course kind of throw it out, I don't, I don't know that you can say it's going to fluctuate within the 5 pound range.

Q. Well, within the target area is designed to reflect a 5 pound range, is that right?

A. That's right, yeah.

Q. So if it's fluctuating strictly within the target area, the maximum fluctuation is going to be 5 pounds.

A. Okay, right.

Q. Is that true?

A. That's true.

Q. But if, if the bottom edge of the fluctuation is -- does not match up with the bottom edge of the target area but in fact the bottom edge of the fluctuation matches up with the, the zero line, then it would be fluctuating a little bit above the top of the target area and into the target area, is that right?

A. If I understand what you're saying, I guess that's right, yeah.

Q. Okay, but because -- at the two and a half pounds mark, which is the middle of the 5 pound increment, it's going to have to go -- if it's above two and a half, two and a half plus adjust a little bit, it's going to go up to the next division or if it's a little bit below two and a half it's going to go down to the division below that, so there's going to be sometimes, like you-all had a 1 pound increment, you're not going to get it to weigh right in the middle of the target area, is that right?

A. If things have slowed down where you're that close to it, there's no reason why it shouldn't be in the target area; and then if the middle of the target area, like you say, is the perfect zero, it should not go no more than two and a half pounds up, two and a half pounds down if the SR is right.

Q. *But it would be acceptable if you could get the load to remain perfectly still and the top -- and the indicator was pointed at the very top of the target area, that would be an accurate weight?*

A. *If it's in the black it would be accurate.*

Q. Okay, so if it was perfectly still and pointed right at the top of the black, that would be a good weight?

A. But if it's perfectly still it ought to be right in the middle if it's balanced correctly to begin with, you know, and the SR is right. If everything is correct and it's in the black, it should be a good weight.

Q. But so that assumes that a -- say 202 pounds, to pick a number that doesn't end in zero or five.

A. Okay.

Q. If you've got 252 pounds, it's never going to land right on the --

A. Right, that's right.

Q. So at 252 you're actually going to have to be 2 pounds above zero --

A. Okay.

Q. -- if it's perfectly still.

A. All right.

Q. So I guess my question is this if it's not perfectly still and it's 252, it's going to be fluctuating up and down with the lower part of the fluctuation going about to the zero line and the upper part of the fluctuation going above the target area?

A. Okay.

Q. True?

A. True.<sup>22</sup>

Q. And when the weighmaster determines his weight and closes the trig loop latch, regardless of where the needle was at that point in time, it goes straight down to the bottom?

A. Correct.

There is no substance to respondents' contention that the ALJ misunderstood how respondents' scale operates. He believed the testimony of complainant's witnesses that respondent failed to weigh in the black target area but, rather, weighed all but one of complainant's drafts when the indicator needle was above the target area, on the lightweight side of the indicator.

Respondents further contend that complainant failed to conduct a proper investigation because complainant's investigators did not reweigh the hogs on respondents' scale. However, complainant's witnesses testified that no purpose would have been served by reweighing the hogs on respondents' scale since water from sprinkler hoses was available in the pens and, also, once the hogs are mingled with others not involved in the investigation, it is difficult to determine the identity of the hogs (Tr. 179-81, 189-90). Moreover, reweighing the hogs on the buying station's scale is not ordinarily part of a direct sales investigation (Tr. 78-81; CX 15). The direct sales investigatory technique is described in *In re Muehlenthaler*, 37 Agric. Dec. 313, 322 (1978), *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978), as follows:

Complainant's direct sale investigatory technique, which is involved in this proceeding, has been used in hundreds of weighing investigations throughout the country during the last decade. It consists of determining the exact weight of hogs, which have been thoroughly shrunk out, by weighing them on a highly accurate scale on complainant's truck. (The maximum scale error was 4 ounces or less (Findings 5 and 10, *supra*)). The truck is jacked up and the scale is

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<sup>22</sup>This answer to respondents' hypothetical question (stating that it is proper to report the weight of a 252-pound hog when the lower part of the fluctuation goes to about the zero line, and the upper part of the fluctuation goes above the target area) is accurate, assuming that the mid-point of the (slight) fluctuation is within the black target area. However, that does not describe Mr. Auten's observations at issue here.

carefully tested before each use. It is balanced before weighing each hog. Two or more experts witness each step of this preliminary procedure. The hogs are then hauled a very short distance and sold a few minutes later to the subject under investigation. The evidence in this case establishes (Findings 8 and 13, *supra*), and it has been repeatedly held, that shrinkage between the time of complainant's weighing and the respondents' weighing is eliminated from consideration, for all practical purposes, by complainant's method of handling the hogs during such an investigation. See, e.g., *In re Livestock Marketers*, 35 Agric. Dec. 1552, 1557 (1976), affirmed *sub nom. Livestock Marketers, Inc. v. United States*, 558 F.2d 748 (C.A. 5), certiorari [denied, 435 U.S. 968 (1978)]; *In re Braxton M. Worsley*, 33 Agric. Dec. 1547, 1554 (1974); *In re J.A. Speight*, 33 Agr Dec 280, 292-293, 301, 306-307 (1974); *In re R.D. Bryan*, 29 Agr Dec 816, 822-823 (1970); *In re Davenport Packing Co.*, 20 Agr Dec 188, 191-192 (1961).

Similarly, the direct sales investigatory technique is described, together with a check-weighing technique, in Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, § 3.64 (1981 and 1989 *supp.*), as follows:<sup>23</sup>

### §3.64 --Detection of False Weighing

The Packers and Stockyards agency detects false weighing by means of check weighing livestock at auction stockyards which weigh livestock at the time of sale, and by sales of preweighed livestock at dealer or packer buying stations and in-weight auction stockyards which weigh livestock as soon as it is delivered. Such investigations are conducted on the basis of complaints or on a spot check basis.

In a check weighing investigation, Packers and Stockyards scales and weighing specialists reweigh a number of livestock at a market, generally at the conclusion of a sale.<sup>428</sup> They begin the check weighing by balancing the scale to determine whether it is properly balanced.

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<sup>428</sup>The regulations require regulated persons to reweigh livestock or live poultry on request of duly authorized representatives of the secretary. 9 CFR §§ 201.76, .109. The requirements in 9 CFR §§ 201.76, .109 were consolidated into a single section in 1984, to be codified at 9 CFR § 201.76. 49 Fed Reg 37371, 37374-75 (1984). The new section clarifies that livestock carcasses are subject to reweighing. *Id.*

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<sup>23</sup>The 1981 version and the 1989 supplement are combined into one quotation.

A back-balanced scale is always strong evidence of deliberate false weighing since a livestock scale will generally become over-balanced rather than back-balanced due to the accumulation of debris on the scale.<sup>439</sup> Most scales found to be back-balanced are back-balanced

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<sup>439</sup>*In re Muchlenthaler*, 37 Agric Dec 313, 325, *affd mem*, 590 F.2d 340 (8th Cir 1978); *In re Burrus*, 36 Agric Dec 1668, 1687-89 (1977), *affd per curiam*, 575 F.2d 1258 (8th Cir 1978); *In re Cordele Livestock Co*, 36 Agric Dec 1114, 1130 n 5 (1977), *affd mem*, 575 F.2d 879 (5th Cir 1978); *In re Overland Stockyards, Inc*, 34 Agric Dec 1808, 1816 (1975); *In re Columbus-Muscogee Livestock Auction, Inc*, 31 Agric Dec 63, 77 (1972).

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from 5 to 15 pounds. A scale back-balanced by 123 pounds is such a flagrant violation of the act as to warrant a lengthy suspension order, even in the absence of proof of short weighing. *In re DuQuoin Packing Co*, 41 Agric Dec 1367, 1382 (1982).

If the check weighing reveals a back-balanced scale and false weights, the fact that all of the animals were not short weighed by the amount of the back-balanced scale does not detract from the agency's case since it is easy to weigh animals by an amount different from that which would be expected from the back-balanced condition of the scale.<sup>440</sup> Similarly, inconsistent weighing results, e.g., some animals not short weighed and some animals short weighed much more than others, does not detract from the agency's case.<sup>441</sup>

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<sup>440</sup>*In re DuQuoin Packing Co*, 41 Agric Dec 1367, 1382 n 4 (1982); *In re Unionville Sales Co*, 38 Agric Dec 1207, 1211 (1979) (remand order), *final decision*, 40 Agric Dec 736 (1981); *In re Muchlenthaler*, 37 Agric Dec 313, 327-30, *affd mem*, 590 F.2d 340 (8th Cir 1978); *In re Cordele Livestock Co*, 36 Agric Dec 1114, 1130 (1977), *affd mem*, 575 F.2d 879 (5th Cir 1978); *In re Livestock Marketers, Inc*, 35 Agric Dec 1552, 1558 (1976), *affd per curiam*, 558 F.2d 748 (5th Cir 1977), *cert denied*, 435 US 968 (1978); *In re Trenton Livestock, Inc*, 33 Agric Dec 499, 513 (1974), *affd mem*, 510 F.2d 966 (4th Cir 1975).

<sup>441</sup>*In re Saylor*, 44 Agric Dec 2238, 2553-54 (1985) (final decision on remand); *In re Unionville Sales Co*, 38 Agric Dec 1207, 1211 & n 5 (1979) (remand order), *final decision*, 40 Agric Dec 736 (1981).

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A scale test by the Packers and Stockyards employees is part of any weighing investigation to determine whether the scale is accurate and operating properly.



In a weighing investigation involving the sale of preweighed livestock, the investigators use two trucks, one of which is equipped with a single-animal (highly accurate) livestock scale which weighs livestock to the nearest pound. The trucks are driven to a location a short distance from the buying point under investigation (usually a mile or two away), where the rear end of the truck with the scale is jacked up into a rigid condition, and the scale is tested for accuracy. The animals involved in the investigation are weighed individually and transferred to the second truck, which is then driven to the market under investigation.

The livestock to be used in a direct sales weighing investigation is taken off of feed and water in sufficient time to be "gaunt" and "shrunk out" by the time it is weighed near the market under investigation thereby eliminating from consideration shrinkage between the time of the investigators' weighing and the buyer's weighing.<sup>482</sup>

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<sup>482</sup>*In re Muchlenthaler*, 37 Agric Dec 313, 322, *aff'd mem.*, 590 F2d 340 (8th Cir 1978); *In re Cordele Livestock Co.*, 36 Agric Dec 1114, 1127-28, 1132 (1977), *aff'd mem.*, 575 F2d 879 (5th Cir 1978); *In re Livestock Marketers, Inc.*, 35 Agric Dec 1552, 1557 (1976), *aff'd per curiam*, 558 F2d 748 (5th Cir 1977), *cert denied*, 435 US 968 (1978); *In re Worsley*, 33 Agric Dec 1547, 1554 (1974); *In re Speight*, 33 Agric Dec 280, 292-93, 301 n 6, 306-07 (1974); *In re Bryan*, 29 Agric Dec 816, 823 (1970); *In re Davenport Packing Co.*, 20 Agric Dec 188, 191-92 (1961).

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The argument that the scale in the Packers and Stockyards truck does not give accurate weights because the front end of the truck is not jacked up to take the tension off of the front springs has been rejected.<sup>483</sup> In addition, the argument that the agency has published no standards of acceptable shrinkage between the time the livestock is weighed on the agency's truck and sold a few minutes later to the subject of the investigation has also been rejected.<sup>484</sup>

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<sup>483</sup>*In re Cordele Livestock Co.*, 36 Agric Dec 1114, 1130-31 (1977), *aff'd mem.*, 575 F2d 879 (5th Cir 1978); *In re Livestock Marketers, Inc.*, 35 Agric Dec 1552, 1557 (1976), *aff'd per curiam*, 558 F2d 748 (5th Cir 1977), *cert denied*, 435 US 968 (1978).

<sup>484</sup>*In re Cordele Livestock Co.*, 36 Agric Dec 1114, 1131-33 (1977), *aff'd mem.*, 575 F2d 879 (5th Cir 1978); *In re Livestock Marketers, Inc.*, 35 Agric Dec 1552, 1557-58 (1976), *aff'd per curiam*, 558 F2d 748 (5th Cir 1977), *cert denied*, 435 US 968 (1978).

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A careful examination of the entire record shows quite clearly that complainant conducted a proper investigation, and that respondents short weighed the hogs on all five drafts at issue here. In fact, the 2-pound back-balanced condition of the scale and the insertion of the scale ticket in the poise prior to determining the weight guaranteed a 4-pound short weight on each draft (Finding 17). In addition, as to four of the five weighings, the evidence shows that Charles Hutto determined the weight while the indicator needle was above the target area, which guarantees a short weight.

Although complainant is not required to prove a motive for respondents' short weighing, any dealer buying hogs and reselling them to a packer on the original purchase weights has a motive for short weighing, viz., to keep the packer happy by providing a good yield (Tr. 239; and see Tr. 246). As stated in *In re White*, 47 Agric. Dec. \_\_\_, slip op. at 104-06 (Jan. 11, 1988), *aff'd per curiam*, 865 F.2d 262 (6th Cir. 1988) (unpublished), quoting from *In re Parchman*, 46 Agric. Dec. 791, 835-37 (1987), *aff'd*, 852 F.2d 858 (6th Cir. 1988):

It is well-settled that auction houses have innate reasons to short weigh, and that careless or deliberate false weighing is an unfair and deceptive practice. Both the literature and the Department's cases are quite specific that short weighing, *inter alia*, harms competing markets by taking potential sellers from them, deprives sellers of their correct full payment for their livestock, and induces packers to pay more per pound or not deduct for shrinkage, because of higher yields on short-weighted livestock.

For instance, in Campbell, *The Packers and Stockyards Act Regulatory Program*, 1 Davidson, Agricultural Law 269-70, 271 (1981 and 1986 Cum. Supp.), it is stated:

False weighing is not only unfair to the livestock sellers who are short-weighted but also to competing markets, since false weighing may draw buyers (who know of the favorable weights) from competing markets, and buyers who know of the favorable weights may pay a little more per pound for the livestock, thereby attracting additional sellers.<sup>423</sup>

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<sup>423</sup>*In re Muchlenthaler*, 37 Agric Dec 313, 321, *aff'd mem*, 590 F.2d 340 (8th Cir 1978); *In re Cordele Livestock Co*, 36 Agric Dec 1114, 1133 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir 1978); *In re Loretz*, 36 Agric Dec 1087, 1095 n 5 (1977); *In re Townsend*, 35 Agric Dec 1604, 1622 (1976); *In re Overland Stockyards, Inc*, 34 Agric Dec 1808, 1819 (1975); *In re Worsley*, 33 Agric Dec 1547, 1577 n 24 (1974); *In re Trenton Livestock, Inc*, 33 Agric Dec 499, 526 n 24 (1974), *aff'd mem*, 510 F.2d 966

(4th Cir 1975); *In re Speight*, 33 Agric Dec 280, 317 n 24 (1974).<sup>24</sup>

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Although the agency does not have to prove the motive for false weighing, a dealer who sells livestock to packers based on the dealer's purchase weights has a motive for short weighing. Packers are well aware of the yields they get from livestock, and if they get favorable yields because of a dealer's short weighing, they might pay more per pound or not deduct for excessive shrinkage.<sup>25</sup>

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<sup>24</sup>*In re Muehlenthaler*, 37 Agric Dec 313, 321, *affd mem*, 590 F2d 340 (8th Cir 1978); *In re Livestock Marketers, Inc*, 35 Agric Dec 1552, 1557-58 (1976), *affd per curiam*, 558 F2d 748 (5th Cir 1977), *cert denied*, 435 US 968 (1978); *In re Tranton Livestock, Inc*, 33 Agric Dec 499, 526 n 24 (1974), *affd mem*, 510 F2d 966 (4th Cir 1975); *In re Speight*, 33 Agric Dec 280, 317 n 24 (1974).<sup>25</sup>

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Moreover, even slight false weighing is a serious violation of the Act, is one of the most deceptive practices under the Act, and is virulently anti-competitive. A succinct description of just how short weighing can be utilized for unfair competitive advantage appears in *In re Overland Stockyards*, 34 Agric. Dec. 1808, 1843 n.24 (1975) (emphasis added):

However, even slight false weighing is a serious violation of the Act. The cumulative effect of 10 to 20 percent of the livestock in the country being short-weighed even by a small amount is an unwarranted burden to the livestock industry which should be significantly reduced. False weighing, at times, is used as an unfair competitive practice, rather than (or in addition to) being a means of underpaying the seller. As stated in *In re Kenneth W. Miller*, 33 Agriculture Decisions [88], P & S Docket No. 4721, decided December 7, 1973:

Mr. Matteson, Area Supervisor for the Arlington Area Office, which encompasses the State of North

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<sup>24</sup>Accord *In re Parchman*, 46 Agric. Dec. 791, 835-37 (1987), *aff'd*, 852 F.2d 858 (6th Cir. 1988).

<sup>25</sup>Accord *In re White*, 47 Agric. Dec. \_\_\_\_, slip op. at 104-06 (Jan. 11, 1988), *aff'd per curiam*, 865 F.2d 262 (6th Cir. 1988) (unpublished).

Carolina, testified that short-weighting is a problem in the livestock industry. It is one of the most deceptive practices under the Packers and Stockyards Act. The producer or farmer who sells livestock looks to the price he will receive. He assumes the scales are tested and accurate and that his livestock will be weighed correctly. He will therefore sell his hogs to the buyer who will pay him the highest price. A buyer who short-weighs livestock is able to offer a few cents more per pound since he is paying it on a weight that is less than the actual weight of the livestock. The buyer who short-weighs livestock therefore has an unfair means of perpetuating himself in business at the expense of his competitors who weigh livestock accurately.

The evidence shows that in several instances Mr. Miller sold the hogs to H. P. Beale and Sons at the same weight he had purchased them from Mr. Stephens. At first blush this may indicate that respondents did not benefit when they short-weighted the livestock, but this is far from true. It is a common practice in the industry for a buying station and packer to have an agreement as to shrink. It is common that the packer will allow a 2 or 2-1/2 percent shrink or weight loss during shipment from the buying station. If the shrink exceeds this amount the packer will bill the buying station back for the excess loss. If the shrink is consistently over the allowed percentage, a packer would probably look for another buying station from which to buy his hogs. A dealer who short-weighs hogs when he buys them and then sells them on his purchase weight is eliminating his shrink to the packer. The packer gets a high yield hog on slaughter and the buying station gets a satisfied customer and sure market for his hogs.

A livestock buyer for Greenwood Packing Plant, to whom respondents sold most of their slaughter hogs, testified that shrink is important to a packer, and that Greenwood Packing Plant went over a computer printout each day after slaughter showing the yield of each lot of hogs (Tr. 462-69). It is common knowledge in the livestock and packing industries that packers regularly compute the yield on slaughtered livestock, and compare the yield from various sources. Hence respondents had an obvious motive for short weighting the hogs involved in this proceeding.

Contrary to the ALJ's determination, I infer that respondents intentionally short weighed the hogs at issue here. Placing the scale ticket in the poise before determining the weight necessarily results in short weighting. The Instructions for Weighing Livestock (Scales and Weighing Memorandum No. 3), quoted above, state (9 C.F.R. § 201.73-1(g)(1); CX 13, p. 3):

(g) General precautions. (1) The poises of weighbeam scales are carefully adjusted and sealed to a definite weight at the factory and any change in that weight seriously affects weighing accuracy. A weigher, therefore, should be certain that poise parts do not become broken, loose or lost and that no material is added to a poise. Balancing or weighing shall not be performed while a scale ticket is in the slot of a weighbeam poise.

The Instructions for Weighing Livestock, just quoted, contain only four pages of instructions, and Charles Hutto acknowledged on January 15, 1971, that he read the instructions (CX 11). Furthermore, in April of 1978, Mr. Pichard, one of complainant's investigators, caught Charles Hutto inserting the scale ticket in the poise of the beam prior to determining the weight of the livestock, and he expressly advised him that that procedure is totally wrong, that the poise is calibrated, and that you should not add any weight to the poise before coming to the correct determination of the weight (Tr. 41-42). I infer, therefore, that when Charles Hutto did the same thing 9 years later in the transactions involved here, he was deliberately short weighing the hogs.

Furthermore, on four of the five weighings involved here, Charles Hutto weighed the hogs while the indicator needle was above the target area. Similarly, Mr. Auten testified that he observed Charles Hutto weighing a number of other lots of hogs in the same manner. He did not observe Charles Hutto weigh any hogs below the central target area (i.e., on the heavy right side of the indicator). This, too, causes me to infer that Charles Hutto was not merely negligent or careless but, rather, was deliberately short weighing the hogs to a slight extent.

However, the sanction would be the same in this case irrespective of whether respondents' violations were intentional. As stated in *In re Chastain*, 7 Agric. Dec. \_\_\_, slip op. at 37-46 (Feb. 22, 1988), *aff'd per curiam*, 860 F.2d 1086 (8th Cir. 1988) (unpublished):

For the foregoing reasons, I infer that respondents' short weighing was intentional. But the sanction would be the same even if it were not intentional. As stated in *In re White*, 47 Agric. Dec. \_\_\_, slip op. at 103 (Jan. 11, 1988), [*aff'd per curiam*, 865 F.2d 262 (6th Cir. 1988) (unpublished)], "even slight false weighing is a serious violation of the Act, is one of the most deceptive practices under the Act, and is virulently anti-competitive." These principles were stated in *White*, *supra* (slip op. at 103-06), quoting from *In re Parchman*, 46 Agric. Dec. [791, 835-37 (1987), *aff'd*, 852 F.2d 858 (6th Cir. 1988)], as follows:

...<sup>26</sup>

False weighing defeats the primary purpose of the Act. As stated in *White*, *supra*, slip op. at 107-08, quoting from in *In re Spencer*

<sup>26</sup>The omitted material is the same material quoted from *White* and *Parchman* above.

*Livestock Commission Co.*, 46 Agric. Dec. [268, 424-26, 432-33 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)];

The legislative history . . . [of the Act states] (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 1 (1957), *reprinted in* 1958 U.S. Code Cong. & Ad. News 5212, 5213; *emphasis supplied*):

### PRINCIPAL PROVISIONS OF THE ACT

The Packers and Stockyards Act was enacted by Congress in 1921. *The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing and in the meat packing industry.* The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.

Hence the "primary purpose" of the Act is to assure not only fair competition, but, also, "fair trade practices in livestock marketing" and meat packing. . . .

The broad scope of the Packers and Stockyards Act was recognized in 1921 as follows (H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921)):

A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial [sic], supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

Furthermore, Congress has repeatedly broadened the Secretary's regulatory authority under the Act. In 1924, the Act was broadened to authorize the Secretary to suspend registrants and require bonds of registrants (Act of June 5, 1924, Pub. L. No. 201, 43 Stat. 460, codified at 7 U.S.C. § 204). The Act was broadened to cover live poultry dealers or handlers in 1935 (Act of Aug. 14, 1935, Pub. L. No. 272, § 503, 49 Stat. 649, codified at 7 U.S.C. §§ 192, 218b, 221, 223). In 1958, the Act was broadened to give the Secretary "jurisdiction over all livestock

marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size" (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 5 (1957), *reprinted in* 1958 U.S. Code Cong. & Ad. News 5212, 5216). In 1976, the Act was broadened to authorize packer-bonding, temporary injunctions, and civil penalties; to require prompt payment of packers, market agencies, and dealers; and to eliminate the requirement that the Secretary prove that each violation occurred "in commerce" (Act of Sept. 13, 1976, Pub. L. No. 94-410, 90 Stat. 1249).

From the foregoing, it is clear that Congress has, over the years, recognized the need to assure fair trade practices in the livestock marketing industry in view of the nature of the industry and its importance to the national economy.

For the foregoing reasons, even slight false weighing is a serious violation of the Act. However, as stated above, the sanction imposed in this case would be the same even if short-weighing a single draft of steers by 170 pounds and another steer by 10 pounds were not, in fact (i.e., according to a reviewing court), serious violations.

In reviewing this decision, the court should not determine whether this administratively-imposed sanction is reasonable by virtue of what the court, itself, would have imposed. Rather, the court should only reverse if the sanction fails to meet the standards of the Administrative Procedure Act (5 U.S.C. § 706(2)(A)). [Footnote omitted.] This principle is enunciated in *Spencer* (*supra*, 46 Agric. Dec. at 427-28, 430), as follows:

Since the views of administrative officials and industry leaders vary widely as to what suspension period is "reasonable" for a particular type of violation, it can be expected that the same diversity of viewpoint will be found among the reviewing judges throughout the country. By way of analogy, it is well recognized that the sentences by judges in criminal proceedings vary widely, in identical situations, e.g., ranging from 3 years to 20 years imprisonment. As stated in the legislative history of the recent sentencing-reform legislation (S. Rep. No. 225, 98th Cong., 2d Sess. 38, 41, 44-45, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3221, 3224, 3227-28 (footnotes omitted)):

[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another—convicted of the very same

crime and possessing a comparable criminal history--may be sentenced to a lengthy term of imprisonment. . . .

. . . .

## 2. Disparity and uncertainty in current Federal sentencing

### a. Practices of the Federal judiciary

The absence of a comprehensive Federal sentencing law and of statutory guidance on how to select the appropriate sentencing option creates inevitable disparity in the sentences which courts impose on similarly situated defendants.<sup>19</sup> This occurs in sentences handed down by judges in the same district and by judges from different districts and circuits in the Federal system.<sup>20</sup> One judge may impose a relatively long prison term to rehabilitate or incapacitate the offender. Another judge, under similar circumstances, may sentence the defendant to a shorter prison term simply to punish him, or the judge may opt for the imposition of a term of probation in order to rehabilitate him.<sup>20</sup>

. . . Similar discrepancies in Federal sentences for a number of different offenses were found in a landmark study by the United States Attorney's Office for the Southern District of New York.<sup>21</sup> Further probative evidence may be derived from another 1974 study in which fifty Federal district court judges from the Second Circuit were given twenty identical files drawn from actual cases and were asked to indicate what sentence they would impose on each defendant.<sup>22</sup> The variations in the judges' proposed sentences in each case were astounding, as shown in the following chart:

. . . .

In one extortion case, for example [in the study referred to in the preceding paragraph], the range of sentences varied from twenty years imprisonment and a \$65,000 fine to three years imprisonment and no fine.<sup>23</sup>

The findings of the Second Circuit study have been reconfirmed in a study performed for the Department of Justice in which 208 active Federal judges specified the sentences they would impose in 16 hypothetical cases, 8 bank robbery cases, and 8 fraud cases. In only 3 of the



16 cases was there a unanimous agreement to impose a prison term. Even where most judges agreed that a prison term was appropriate, there was a substantial variation in the lengths of prison terms recommended.<sup>24</sup> In one fraud case in which the mean prison term was 8.5 years, the longest term was life in prison. In another case the mean prison term was 1.1 years, yet the longest prison term recommended was 15 years.<sup>25</sup>

The study also concluded that, while 45 percent of the variance in sentences for hypothetical cases was attributable to differences in offense and offender characteristics, 21 percent was directly attributable to the fact that some judges tend to give generally tough or generally lenient sentences,<sup>26</sup> 22 percent of the variation was attributable to interactions between the "judge factor" and other factors. For example, some judges sentence more harshly for a particularly offense than other judges even though they do not sentence more harshly overall, and some judges sentence relatively more harshly than other judges if the defendant has a prior record.<sup>27</sup>

....

In addition, as indicated in the following chart, a study of the two districts in each of the 11 Federal judicial circuits that sentenced the greatest number of offenders in 1972 for a selected group of offenses shows widespread sentencing disparity:

....

The Committee finds that this research makes clear that variation in offense and offender characteristics does not account for most of the disparity.<sup>28</sup>

If reviewing courts throughout the country were free to hold that any suspension period imposed by the Judicial Officer is not "reasonable" if it exceeds (or exceeds by a substantial amount) that which the reviewing court would have imposed, it will destroy not only the desired nationwide uniformity, but, also, a times, important regulatory programs (due to the court's lack of familiarity with the total administrative program).

For example, in *Glover Livestock Comm'n Co. v. Hardin*, 45 F.2d 109 (8th Cir. 1972), *rev'd*, 411 U.S. 182 (1973), the Eighth Circuit set aside as "unconscionable" (454 F.2d at 115) a 20-day suspension order issued against an auction market for shot

weighing livestock on February 25, 1969, after the auction had been warned about prior short weighing in 1966 and 1967. If the Eighth Circuit's decision had not been reversed, it would have totally destroyed the agency's check-weighing program throughout the country. In fact, if the Secretary could issue no more than a cease and desist order when false weighing was detected after two prior warning letters, it would have been prudent for the agency to completely discontinue any effort at check weighing, using the agency's limited money and manpower in other areas. Registrants under the Packers and Stockyards Act fear a cease and desist order about as much as they would fear a slap across the face with a wet noodle! The Eighth Circuit's decision, if not reversed, would have made it cost-effective to run the risk of a cease and desist order for short weighing. And when short weighing is practiced by one auction market in an area, it attracts volume from other markets, which leads to short weighing by other markets in the area to hold their volume.<sup>25</sup>

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<sup>25</sup>*In re Muehlenthaler*, 37 Agric. Dec. 313, 321, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Loretz*, 36 Agric. Dec. 1087, 1095 n.5 (1977); *In re Townsend*, 35 Agric. Dec. 1604, 1622 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1819 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1577 n.24 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 526 n.24 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 317 n.24 (1974).

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I am confident that the Eighth Circuit had no idea that its decision would totally destroy the agency's check-weighing program. It had little knowledge of the weighing problem in the livestock industry (see *In re Muehlenthaler*, 37 Agric. Dec. 313, 331-32, 353-69, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978)), and the Department's check-weighing program. It is quite likely that the court was aware of only "four [prior] decisions of the Secretary in which suspensions of registration [were] imposed for short-weighing consigned cattle" (454 F.2d at 114). As a matter of fact, suspension orders in short-weighing cases had previously been issued by the Judicial Officer in 148 cases during the prior 25 years, with suspension periods of 5 years (1 case), 4 years (2 cases), 3 years (6 cases), 30 months (1 case), 2 years (6 cases), 20 months (1 case), 18 months (6 cases), 16 months (2 cases), 15 months (2 cases), and 1 year (15 cases). Hence prior suspension orders of a year or longer had

previously been issued for short weighing in 42 cases by the Judicial Officer during the 25-year period preceding *Glover*. A table listing the suspension periods imposed for false weighing or causing false weighing of livestock from 1950 to January 1974 is set forth in *In re Worsley*, 33 Agric. Dec. 1547, 1584-92 (1974). The table is summarized in the decision in that case (*id.* at 1576). The maximum suspension for short weighing was 5 years, the average 245 days and the median 90 days (*id.* at 1575-76). All but the last 12 of the 160 cases listed in the table were decided by the Judicial Officer prior to the Eighth Circuit's decision in *Glover*.

We do not know whether the Eighth Circuit would still have regarded the 20-day suspension in *Glover* as "unconscionable" if it had known of the 148 prior cases during the preceding 25 years in which the median suspension period was about 90 days.<sup>27</sup> Presumably, the Department's appellate attorneys regarded the citation of four prior precedents involving 30-day suspension orders as sufficient to support the 20-day suspension order involved in *Glover*. (It is not feasible within the limited confines of an appellate brief to fully educate each reviewing court as to the totality of facts bearing on an administrative sanction).

If the congressional purpose of this remedial legislation is to be achieved, and if any degree of national uniformity in sanctions is to be achieved, reviewing courts must not determine whether an administratively imposed suspension period is "reasonable" based on what suspension period they would have imposed. Rather, they should reverse only if the administrative sanction fails to meet the standards of the Administrative Procedure Act, i.e., if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706(2)(A)). And it goes without saying that an administrative suspension period that greatly exceeds that which would have been imposed by the reviewing court is not necessarily arbitrary, capricious, or an abuse of discretion.

The sanctions imposed in false weighing cases from 1950 to 1974, summarized in *Worsley*, referred to in the preceding quotation, is summarized in *In re White*, *supra*, slip op. at 119-20, as follows:

The import of the *Worsley* list was stated clearly in *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. [268, 429-30 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)], to be that the

<sup>27</sup>In *Chanah*, from which this material is quoted, the Eighth Circuit affirmed a 3-month suspension order for short weighing violations.

maximum suspension for false weighing was 5 years, the average was 245 days and the median was 90 days, as follows (emphasis added):

A table listing the suspension periods imposed for false weighing or causing false weighing of livestock from 1950 to January 1974 is set forth in *In re Worsley*, 33 Agric. Dec. 1547, 1584-92 (1974). The table is summarized in the decision in that case (*id.* at 1576). The maximum suspension for short weighing was 5 years, the average 245 days and the median 90 days (*id.* at 1575-76).

Moreover, even if only *litigated* false weighing cases are considered, the "average suspension imposed in such litigated cases [from 1950 to 1974] was 252 days [or slightly more than 8 months]." *In re Worsley*, 33 Agric. Dec. 1547, 1576 n. 22 (1974).

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, e.g., *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 424-32, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), attached as an Appendix to this decision.<sup>24</sup>

It should be noted that significant changes were made in the Department's sanction policy following (and as a result of) the holding in *Farrow v. USDA*, 760 F.2d 211 (8th Cir. 1985). The legislative history of the Act and the

<sup>24</sup>Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, e.g., in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 820 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 150 (5th Cir. 1980) (unpublished); *In re Gold Bell-J&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1363-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 760, 780, 782 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Trugash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 535-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

erial relevant to the *Farrow* decision are set forth in *Spencer*, 46 Agric. Dec. at 424-31, 455-62 (Appendix at 198-208, 242-51).

In addition, the sanctions imposed under the Packers and Stockyards Act recent years have been much more severe than during earlier years, e.g., *In re Mendicoo*, 48 Agric. Dec. \_\_\_\_ (Mar. 16, 1989) (1-year suspension and \$10,000 civil penalty for weighing, bonding, and prompt payment violations); *In re Ferguson*, 48 Agric. Dec. \_\_\_\_ (Mar. 1, 1989) (6-month suspension and \$10,000 civil penalty (held in abeyance) for increasing prices in commission transactions); *In re Great American Veal, Inc.*, 48 Agric. Dec. \_\_\_\_ (Jan. 19, 1989) (\$125,000 civil penalty for failing to pay for livestock, operating while insolvent, giving undue preference to a creditor, and taking over another packer's inventory without paying the packer's creditors), *appeal docketed*, No. 3108 (3d Cir. Feb. 22, 1989); *In re Tiemann*, 47 Agric. Dec. \_\_\_\_ (Oct. 20, 1988) (5-year suspension for failure to pay \$27,000 for livestock, to be reinstated after 180 days if full payment made); *In re Mufreesboro Livestock Auction, Inc.*, 46 Agric. Dec. \_\_\_\_ (Aug. 13, 1987) (1-year suspension for fiduciary account violations and various fraudulent activities); *In re Parchman*, 46 Agric. Dec. 791 (1987) (90-day suspension and \$10,000 civil penalty for weighing violations), *aff'd*, 852 F.2d 858 (6th Cir. 1988); *In re Ratches Pork Packers, Inc.*, 46 Agric. Dec. 573 (1987) (\$50,000 civil penalty for failing to pay for meat products); *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. \_\_\_\_ (1987) (10-year suspension and \$30,000 civil penalty for increasing prices for weights in commission purchases), *aff'd*, 841 F.2d 1451 (9th Cir. 1988); *In re Velch*, 45 Agric. Dec. 1932 (1986) (decision as to Benson) (\$10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act for fraud by an auction market employee); *In re Garver*, 45 Agric. Dec. 1090 (1986) (2-year suspension for failing to pay for livestock), *aff'd*, 846 F.2d 1029 (9th Cir.), *cert. denied*, 109 S. Ct. 63 (1988); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986) (\$50,000 civil penalty for commercial bribery), *aff'd*, 820 F.2d 1103 (9th Cir. 1987); *In re Com State Meat Co.*, 45 Agric. Dec. 995 (1986) (\$50,000 civil penalty for commercial bribery); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590 (1986) (6-month suspension for fiduciary account and check-kiting violations), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (decision as to Millsbaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year, for check-kiting, fiduciary account and payment violations, and purchasing livestock for resale out of consignments); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand) (8-month suspension and \$10,000 civil penalty for fraudulent sales and purchases); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final consent decision*, 44 Agric. Dec. 1971 (1985) (\$10,000 civil penalty for discriminatory promotional allowances); *In re Powell*, 46 Agric. Dec. 49 (1985) (5-year suspension for failure to pay for livestock), *aff'd*, 846 F.2d 1029 (9th Cir. 1988); *In re West Veal Distributors*, 43 Agric. Dec. 1124 (1984) (\$77,000 civil penalty, but \$27,000 suspended, for payment, bond and trust violations); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year suspension for payment violations), *appeal dismissed*, No. 84-4316 (5th Cir.

July 25, 1984); *In re Peterman*, 42 Agric. Dec. 1848 (1983) (\$20,000 civil penalty for bait-and-switch advertising and deceptive practices), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

The order of the ALJ suspends respondents as registrants for 90 days at all business locations, and assesses a civil penalty of \$20,000. In Complainant's Reply to Respondents' Appeal, complainant seeks to increase the suspension period to one year, but with the business location at Holly Hill to resume operations after 90 days (the remaining 9 months at that location to be held in abeyance pending compliance with the cease and desist order).<sup>29</sup>

Although I give great weight to the recommendation of the officials charged with the responsibility for administering regulatory programs as to the appropriate sanction (*Spencer* Appendix, slip op. at 231; 46 Agric. Dec. at 447-48), I am limiting the sanction to that ordered by the ALJ, for a number of reasons.

First, the suspension order applies to respondents' auction yard in Holly Hill, South Carolina, even though the violations occurred only at respondents' buying station in Manning, South Carolina. Second, the civil penalties totaling \$20,000 are substantially higher than the civil penalties usually imposed in false weighing cases that do not involve aggravating circumstances.

In this case, there are aggravating circumstances, but I believe that complainant placed too much reliance on them. Respondents had been warned about weighing violations on six prior occasions, June of 1973 (CX 4; Tr. 28-32), October of 1973 (CX 6), May of 1974 (CX 7, 8), June of 1976 (Tr. 36-37), November of 1976 (CX 9, 10), and April of 1978 (Tr. 41-42). On four of those occasions, respondents were advised that they were not properly filling out their scale tickets (June of 1973, October of 1973, May of 1974, and November of 1976). On another occasion, respondents were also warned that they were failing to complete their scale tickets properly (August of 1972 (CX 14A; Tr. 25-28)), and on three other occasions, not involving violations, they were advised as to the proper manner of completing scale tickets (CX 1-3). Although there is no statute of limitations relating to warning letters, the fact that the most recent of the prior violations occurred 9 years before the present violations detracts, to some degree, from the flagrancy of the present violations. This is offset, to some extent, by the great number of prior violations.

In any event, however, we must keep in mind that the prior violations were not alleged in the complaint or proven as violations warranting a sanction at this time. Accordingly, the prior violations cannot be used, as they were in *Spencer*, *supra*, to justify a vastly increased sanction because of prior, proven violations (10 years in *Spencer*). Nonetheless, the fact that the present violations occurred at all after so many prior warnings is an aggravating circumstance, irrespective of whether prior violations actually occurred.

<sup>29</sup>The Department's rules of practice permit a party to raise new issues in its answer to the opposing party's appeal, which, in effect, amounts to a cross-appeal. *In re White*, 47 Agric. Dec. \_\_\_\_\_, slip op. at 55-58 (Jan. 11, 1988), *aff'd per curiam*, 865 F.2d 262 (6th Cir. 1988) (unpublished).

Considering all of the circumstances, I am affirming the ALJ's sanction with some reluctance, rather than increasing it, as requested by complainant. Respondents contend that the criteria in 7 U.S.C. § 213(b), relating to civil penalties, must be considered in determining the length of suspension orders. But there is no merit to that contention. As stated in *Spencer Livestock Commission Co. v. Department of Agriculture*, 841 F.2d 1451, 1457 (9th Cir. 1988), in affirming a 10-year suspension order under the Packers and Stockyards Act:

2. Factors Considered Under § 213(b)

Petitioners contend that factors the statute mandates the ALJ and JO to consider preclude the imposition of a 10-year suspension. Section 213(b) requires the Secretary, before assessing monetary penalties, to consider "the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business." 7 U.S.C. § 213(b). Section 204, which permits the Secretary to suspend a registrant "for a reasonable specified period," contains no parallel provision. 7 U.S.C. § 204.

Nonetheless, petitioners argue that it is reasonable to read the § 213(b) factors into § 204, since "it does not appear to be the congressional intent to permit a sanction which has the effect of completely and permanently excluding a person from the livestock marketing industry." Brief of Petitioner at 29.

Petitioners cite no authority for this contention, nor is there any. A more reasonable reading than that advanced by petitioner is that since Congress chose to include the language in one provision and omit it from the other, it did not require the factors to be considered as to the latter. [Footnote omitted.]

Finally, the ALJ correctly held that proof of willfulness is not required since warning letters were sent to respondents. In addition, the violations here were clearly willful, irrespective of whether they were intentional. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185, 187 (1972); *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975).

For the foregoing reasons, the following order should be issued.

**Order**

1. The corporate Respondent, Hutto Stockyard, Inc., and the individual Respondents, John D. Hutto and Charles L. Hutto, their agents or employees, directly or through any corporate or other device, shall cease and desist from:

- a. Weighing livestock at other than their true and correct weights;

- b. Issuing scale tickets, purchase invoices, or other accounts of sale on the basis of false or incorrect weights;
- c. Paying the sellers of livestock on the basis of false or incorrect weights;
- d. Failing to issue scale tickets in conformity with the requirements of § 201.49 of the regulations; and
- e. Failing to operate any livestock scale owned or controlled by Respondents in such a manner as to insure accurate weights, or otherwise failing to weigh livestock in strict conformity with the requirements of § 201.73-1 of the regulations.

2. The corporate Respondent and the individual Respondents are suspended as registrants under the Act for a period of 90 days at all business locations.

3. In accordance with § 312(b) of the Act (7 U.S.C. § 213(b)), the corporate Respondent, and the individual Respondents, are jointly and severally assessed civil penalties totaling \$20,000.

The civil penalties shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Room 2446, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this order on respondents.

The cease and desist provisions of this order shall become effective on the day after service of this order. The suspension provisions shall become effective on the 30th day after service of this order; *Provided, however*, That if by any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or the part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto, or (ii) upon a showing made by complainant that it is not likely that such an order will be entered by a court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

## APPENDIX

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 2142-43, 435-62, (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).



In re: **HUTTO STOCKYARD, INC., JOHN D. HUTTO, and CHARLES L. HUTTO.**

P&S Docket No. 6933.

Stay Order filed May 9, 1989.

Dennis Becker, for Complainant,

Daniel W. Olsen and C. Bradley Hutto, for Respondents.

Stay Order issued by Donald A. Campbell, Judicial Officer

The civil penalty and suspension provisions of the order previously issued in this case are hereby stayed pending the outcome of proceedings for judicial review.

The cease and desist provisions shall remain in effect.

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In re: **SHASTA LIVESTOCK AUCTION YARD, INC., and ELLINGTON R. PEEK.**

P&S Docket No. D-88-23.

Decision and Order filed April 24, 1989.

**Dealer - Prompt payment to sellers - Payments by draft - Sanctions, piercing of corporate veil - Sanctions, civil penalty - Answer to allegations.**

Respondents violated the Packers and Stockyards Act at 7 U.S.C. § 228b and the Department's regulations at 9 C.F.R. § 201.43(b) upon failures in payments for cattle purchases, which must be prompt, and not by drafts, unless authorized and demonstrated by the sellers' written consent. Respondents issued drafts with the intent and effect of delaying payments to sellers. Late payment for cattle purchases cannot be supported by any excuse. Injury of a potential nature, not rising to actual harm, is sufficient to support the finding of a violation of those sections of the Act prohibiting unfair and deceptive practices (7 U.S.C. § 213(a)). The after ego theory bound the corporate and individual respondents as a single entity, in the purchase and sale of cattle, both as a registered dealer and as a market agency. Procedurally, admissions expressed in respondents' answer are binding. The sanctions entered by the administrative law judge, following the testimony of the Director of the Livestock Marketing Division of the Packers and Stockyards Administration that respondents' actions were perceived as serious violations, required the payment of a \$10,000 civil penalty, the suspension of the corporate respondent as a registrant for 180 days, the removal of the individual respondent from the management of the corporate respondent for 365 days and prohibited prospective violations of the Act and regulations. The Department's counsel appealed the Initial Decision and Order pursuant to 7 C.F.R. § 1.145 contending only that the cease and desist provisions of the Initial Decision were too broad. Thereafter, upon the non-public motion of counsel, the Department's Judicial Officer, approved a stipulation by counsel which increased the civil penalty to \$35,000, eliminated the registrant's suspension, eliminated the sequestration of the individual respondent and ordered respondents to cease and desist from: "Failing to pay, when due, the full purchase price of livestock; and issuing drafts in payment for livestock purchased on a cash basis." This is the fourth order entered by the Department against these respondents. See 30 Agric. Dec. 330, P&S No. 4386 (March 12, 1971); 39 Agric. Dec. 1451, P&S No. 5709 (December 19, 1980) and 39 Agric. Dec. 1458, P&S No. 5783 (December 19, 1980). The order issued in P&S No. 5783 required, in part, that respondents cease and desist from "issuing drafts in payment for livestock purchased without having previously obtained and maintained in their records express written agreements with their sellers for payment for such livestock by draft."

Allan R. Kahan, for Complainant.

John W. Reese, Jr. and Gerard D. Eltsik, for Respondents.

*Decision and Order issued by Paul Kane, Administrative Law Judge.\**

This decision is promulgated pursuant to the Administrative Procedure Act, 1966, as amended, 5 U.S.C.A. §§ 554, 557 (1977 and Supp. 1989) and the Rules of Practice of the Department of Agriculture governing formal adjudicatory administrative proceedings, 7 C.F.R. §§ 1.130-1.151 (1988).

This is a disciplinary proceeding by which the respondents are charged with violations of the Packers and Stockyards Act, 1921, as amended, 7 U.S.C.A. § 213(a), 228b (1980 and Supp. 1988), hereinafter referred to as the "Act" and the Department's regulations relating thereto, 9 C.F.R. § 201.43(b)(1987), instituted upon the issuance of a complaint filed on December 7, 1987 by the Administrator of the Packers and Stockyards Administration, United States Department of Agriculture.

One section of the Act, alleged to have been violated, 7 U.S.C.A. § 213(a), specifies that:

- (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

Another section of the Act alleged to have been violated is 7 U.S.C.A. § 228b, which expresses these mandates:

- (a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of

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\*Editor's note: This initial decision by the Administrative Law Judge became final when the Judicial Officer filed an order (which follows this decision) allowing complainant and respondent to withdraw their appeals, but vacating the provisions contained in the initial order.

transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

- (b) Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a) of this section. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.
- (c) Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

The Act defines those subject to these prohibitions as follows (7 U.S.C.A. § 201):

- (a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;
- (b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;
- (c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce

livestock on a commission basis or (2) furnishing stockyards services; and

- (d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agency of the vendor or purchaser.

The Act further expresses these definitions (7 U.S.C.A. § 182):

- (1) The term "person" includes individuals, partnerships, corporations, and associations;
- (2) The term "Secretary" means the Secretary of Agriculture;
- (4) The term "livestock" means cattle, sheep, swine, horses, mules, or goats - whether live or dead;
- (11) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia.

The Act defines transactions in commerce at 7 U.S.C.A. § 183. However, in view of the content of the defense made in this case, further examination of the term "commerce" is not necessary.

The Secretary's authority to promulgate general regulations is expressed at 7 U.S.C.A. § 228 which provides that:

- "(a) The Secretary may make such rules, regulations and orders as may be necessary to carry out the provisions of this chapter . . ."

The Secretary has indeed published regulations to effectuate Congress' intent in the enactment of the Act. The respondents are also alleged to have violated one of these regulations as expressed at 9 C.F.R. § 201.43(b):

..... *for livestock - terms and conditions.* (1)  
No packer, market agency, or dealer shall purchase livestock for which payment is made by a draft which is not a check, unless the seller expressly agrees in writing before the transaction that payment may be made by such a draft. (In cases of packers whose average annual purchases exceed \$500,000, and market agencies and

dealers acting as agents for such packers, see also § 201.200).

The imposition of sanctions is authorized by the Act at 7 U.S.C.A. § 213. This section in part requires that:

- (b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than \$10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

The imposition of additional sanctions is authorized by the Act at 7 U.S.C.A. § 204, as follows:

... , and whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction. \* \* \*

The Administrative Procedure Act at 5 U.S.C.A. § 558 restrains the imposition of sanctions in the following language:

- (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
- (b) A sanction may not be imposed or a substantive rule or other order issued except within jurisdiction delegated to the agency and as authorized by law.

- (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of wilfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given
- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
  - (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

The complaint, filed December 7, 1987, alleges that the corporate respondent, Shasta Livestock Auction Yard, Inc. ("Shasta"), as the *alter ego* and under the management, direction and control of respondent Ellington R. Peek, purchased livestock in commerce on a cash basis in July and August of 1986 and, in payment for this livestock, issued drafts which were not checks, without having obtained prior written agreements from the sellers, by which agreements the sellers might have displayed a willingness to accept drafts. The complaint further alleges that, as a result of the issuance of drafts, respondents failed to pay, when due, for livestock.

On January 6, 1988, the respondents filed an answer to the complaint in which they "... admit at the times mentioned they have purchased livestock and have issued drafts and that *such drafts do not constitute checks.*" (Emphasis added) By their answer, the respondents deny that the transactions identified in the Department's complaint were made on a cash basis. The respondents further deny a failure to pay, when due, for livestock, averring that all payments for livestock purchases were made in conformity with agreements between Shasta and the sellers. Respondents also deny violations of the Act and regulations.

Counsel to the Department have advanced a proposed order which would require respondents to cease and desist from failing to pay, when due, for livestock and issuing drafts for livestock purchased on a cash basis. The proposed order would also suspend the corporate respondent as a registrant under the Act for a period of 28 days and assess the respondents a civil penalty in the amount of \$10,000.00.

An oral hearing was held before the undersigned on August 16 and 17, 1988, in Redding, California. Respondents were represented by John W. Reese, Jr., Esq., of Reese, Smalley, Wiseman & Schwartz, Redding, California and Gerard D. Effink, Esq., of Van Hooser, Olsen & Parkinson,

P.C., Kansas City, Missouri. Complainant was represented by Allan R. Kahan, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C. At this hearing, exhibits and stipulations were advanced and received and testimony was taken and received from 22 witnesses.

Proposed findings of fact and conclusions were submitted by counsel. Briefing was completed on November 22, 1988. All proposed findings of fact, conclusions of law and arguments in support thereof have been considered. To the extent indicated, they are adopted. All other proposed findings, conclusions and arguments are rejected as irrelevant or lacking legal or evidentiary bases.

This corporate respondent is a stockyard operator, and dealer, annually handling cattle with an aggregate value exceeding \$50,000,000. It is not a meat packer. Central to this case is its status as a registered<sup>1</sup> market agency<sup>2</sup> buying and selling livestock in commerce on its own account. It is also admittedly a registered dealer buying and selling livestock in commerce on its own account. In these classifications, Shasta buys and sells livestock in commerce for its own account, and sells livestock, on commission, in commerce.

The individual respondent, Ellington R. Peek, is the president and manager of the corporate respondent. Mr. Peek is admittedly responsible for the direction, management and control of the corporate respondent. Mr. Peek and his spouse own 92% of the capital stock of Shasta. Based on the evidence, which is discussed hereinafter, Shasta is determined to be the *alter ego* of Mr. Peek.

The transactions in this case involved the purchase in July and August of 1986 of 1,443 head of livestock for the total amount of \$645,287 from eight different sellers. Shasta tendered drafts, rather than checks, in payment for these cattle. Drafts were the negotiable instruments tendered to the sellers in these transactions with the intent and effect of obtaining for Shasta a post-delivery advantage over the sellers. This advantage is perceived to be a significant unfair method of competition in violation of the Act (7 U.S.C.A. § 213(a)), in and of itself, as well as a violation of the express prohibitions of the Act (7 U.S.C.A. § 228b(a)(c)). It is further found that the terms and conditions of the transactions were not substantially modified prior to the dates thereof by written agreement as permitted by Act (7 U.S.C.A. § 228b(b)) and the regulations (9 C.F.R. 201.43(b)). As a result of these conclusions, an order will issue by which respondent will again be directed to cease and desist from prospective violations. It will suspend Shasta's registration for 180

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<sup>1</sup>Registrations with the Secretary of Agriculture are obtained in compliance with the Act at 7 U.S.C.A. § 203 and the regulations at 9 C.F.R. § 201.10, *et seq.* Bonds are obtained in accordance with the Act at 7 U.S.C.A. § 204 and the regulations at 9 C.F.R. § 201.10, *et seq.*

<sup>2</sup>A market agency is associated with the payment or receipt of a monetary commission on a livestock sale transaction. A dealer's activities do not display such a commission. *General Insurance Company of America v. Scanell Livestock Market, Inc.* 351 F.2d 67, 70-71 (8th Cir. 1965); *Sterling Colorado Beef Co.*, P&S No. 5201, 39 Agric. Dec. 184, 214 (1980), appeal dismissed *mo.* 80-1293 (10th Cir. 1980)(unpublished).

consecutive days, excepting those aspects required in the delivery of stockyard services, and it will prohibit Mr. Peek from participating in any of Shasta's business activities for one year. It will also impose a civil penalty of \$10,000.

### Findings of Fact

1. Shasta Livestock Auction Yard, Inc., the corporate respondent, is a corporation organized and existing in the State of California. Its mailing address is P.O. Box 558, Cottonwood, California 96022. (Complaint and Answer)

2. The corporate respondent is, and at all times material herein was:

(a) engaged in the business of buying and selling livestock in commerce for its own account, and selling livestock in commerce on a commission basis; and

(b) registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to buy and sell livestock in commerce on a commission basis. (Complaint and Answer)

3. Respondent Ellington R. Peek is an individual whose business mailing address is P.O. Box 558, Cottonwood, California 96022. (Complaint and Answer)

4. Ellington R. Peek is, and at all times material herein was:

(a) the president and manager of Shasta;

(b) the owner, with his wife of 92 per cent of the stock of Shasta; and

(c) responsible for the management, direction and control of the policies, practices and activities of Shasta. (Complaint and Answer)

5. Mr. Ellington Peek personally owns 90% of the capital stock of Shasta and has been its president and manager since at least 1984. (TR, Vol I, 112; Vol. II, 19)<sup>3</sup> Mr. Peek executed a Department of Agriculture consent decree in 1980 personally, and as a president of Shasta. (TR, Vol. I, 114; CX 5) Mr. Peek has committed his personal reputation to the enhancement of Shasta. (TR, Vol. I, 113, 184, 185; Vol. II, 35, 53) The development of Shasta has been an activity Mr. Peek has pursued for more than 30 years. (TR, Vol. I, 175) Members of the industry rely on Mr. Peek's personal reputation in the conduct of Shasta's business, (TR, Vol. II, 54, 81-82, 90, 97) and Shasta is

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<sup>3</sup>TR" refers to the transcript of the public hearing held in this matter on August 16 (Volume I) and August 17 (Volume II) in Redding, California. "CX" refers to the numbered exhibits offered by complainant's counsel and "RX" refers to the numbered exhibits offered by respondents' counsel at that hearing.



viewed by the industry as being Mr. Peck's. (TR, Vol. II, 77, 80, 97) Mr. Peck has built and stabilized a livestock marketing agency serving sellers in at least three states; California, Oregon and Nevada. (TR, Vol. II, 96-97) Mr. Peck's personal good repute for livestock purchasing was known in a broader area extending to Montana, Wyoming, Utah, and Colorado. (TR, Vol. II, 80)

6. Shasta operated one of California's and the nation's largest stockyards. In 1985, Shasta sold livestock on a commission basis with a total value exceeding \$50,600,000 and, in the same year purchased livestock on a dealer basis with a total cost exceeding \$58,400,000. (TR, Vol. I, 45, 182; Vol. II, 35, 51, 64, 77, 103; CX 1) Shasta's yard auctioned at least 138,000 head of livestock annually. It also purchased more than 170,000 head of cattle in country transactions, thereby overseeing the distribution of more than 800 head of cattle per calendar day. (TR, Vol. I, 181) All of Shasta's cattle purchases were made for resale purposes; cattle were not purchased for slaughter. (TR, Vol. II, 24)

7. Shasta's purchases of livestock were achieved through the efforts and negotiations of Mr. Ellington Peck, his family, employees and order buyers. Shasta purchased cattle in the country upon the dispatch of its employees or agents to ranches of the sellers. At these isolated sites, following inspection, and under the surveillance of those persons representing the buyer and seller, the livestock were weighed and loaded on trucks for immediate shipment from the sellers' premises.<sup>4</sup> Upon completion of these labor-intensive functions, attention was devoted to the calculation of purchase prices which were the arithmetic product of the multiplication of a price expressed in cents per pound by the scale weights. Thereafter, the total purchase amounts were determined and the purchase documents were tendered to the sellers. (TR, Vol. I, 50-56, 63-64, 77, 184; Vol. II, 15, 29, 31, 46, 49, 92) The testimony described the purchase of livestock by Shasta only on a cash basis, for which payment was made by drafts, checks or wire transfers. (TR, Vol. II, 36-37, 40, 44, 56, 92, 98)

8. Shasta has paid for its purchase of livestock by the tender of two different types of negotiable instruments; drafts and checks. (TR, Vol. I, 61, 64; Vol. II, 50-51)

Members of the livestock industry knew the distinguishing features of these two types of commercial paper, and immediately recognized a draft as such. (TR, Vol. I, 61, 64, 68; Vol. II, 39-40, 94) Drafts, in the vernacular, were referred to as "tickets." (TR, Vol. II, 40) Sellers preferred that buyers tender payment in the form of checks, as drafts faced collection delays. For example, one rancher who had reluctantly accepted a Shasta draft for the payment of cattle on September 17, 1986, did not receive credit for its deposit at the seller's financial institution until October 1, 1986. Therefore, the seller's financial institution, to which the seller was previously indebted for general purposes, charged interest to the seller until October 1, 1986. Thus, this rancher was burdened with an identifiable cost which would have been

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<sup>4</sup>The "striking" process displayed by livestock is a continuous phenomenon. Hence, buyers desire immediate transport of all purchased stock soon after weights have been obtained and recorded.

avoided had Shasta paid for its purchase by check. (TR, Vol. I, 64-66, 71, 100, 107, 155)

Members of the financial community also knew the distinguishing characteristics of drafts and checks. An employee of an Oregon bank processing Shasta's drafts testified that a draft on its face, indicated that it is "payable on sight," which meant that the maker had the right to inspect the instrument prior to payment. (TR, Vol. I, 81, 160) An employee from a Nevada bank testified that a "... check is a monetary paper transaction drawn on an account payable automatically with sufficient funds in it; a draft \* \* \* is payable through a bank upon confirmation and approval on presentment." (TR, Vol. I, 97; see also 135, 144) A draft could also be a bill of sale, as well as a monetary control system. (TR, Vol. I, 103, 120, 160, 170) A draft was a useful device to protect buyers by which they might avoid the purchase of mortgaged livestock. (TR, Vol. I, 120, 177; Vol. II, 15, 23) Drafts also obviated the necessity of maintaining multiple bank signature cards. (TR, Vol. I, 139)

A draft was also a device by which an issuing livestock buyer could obscure the maker's true financial posture from revelation to inspectors and auditors of the Packers and Stockyards Administration, as there would be no compulsion on the maker or the maker's financing institution to pay the obligations created by these instruments until payment was authorized by the maker. (TR, Vol. I, 129)

9. The acceptance by livestock sellers of drafts from those who buy their cattle inherently results in a delay of receipt of payment. An exemplary display of this delay is found in this record. Mr. Peek signed a draft on July 9, 1986 in the amount of \$73,036.08 for the purchase of steers and heifers from Roney Land and Cattle Company. This draft was drawn on an unspecified account at the First Interstate Bank of Redding, California. The seller's financial institution, the Bank of America, Chico, California, prepared a collection letter for this draft on July 11, 1986, which letter was received by the First Interstate Bank on July 15, 1986. On July 17, 1986, the First Interstate Bank, which would have advised Shasta of its presentment, and would have received Shasta's authorization to pay, according to its standard procedure (TR, Vol. I, 144) issued its settlement statement and a cashiers check in the amount of \$73,036.08, payable, not to Roney Land & Cattle Company but rather to the Bank of America. Additionally, the First Interstate Bank in its daily statement to Shasta on July 17, 1986, recorded an unnumbered debit of \$73,036.08. (CX 7, pp. 1-6) This record reveals that in all instances, Shasta's Bank issued cashiers checks in payment of each draft presented to it for collection by the sellers' financial institutions. (CX 7, p. 4, 5, 10, 11, 16, 17, 22, 23, 29, 30, 36, 37). The banking industry customarily paid drafts by cashiers checks. (TR, Vol. I, 84)

10. Shasta issued 62 drafts for livestock purchases between July 1, 1986 and August 21, 1986 totalling more than \$3,600,000. No fewer than 2 days, nor more than 17 days, elapsed between the date each sale was completed and the date Shasta's bank issued a check in payment of the transaction. It was on this latter date that Shasta's bank, subsequent to the receipt of Shasta's approval, delivered payment of the purchase price to the sellers' duly

authorized representatives. It was also on this latter date that Shasta's bank debited Shasta's account for payment of the purchase price. The majority of these drafts, 45 in number or 72.5% of the total, were paid by Shasta's bank between five and eight days after the transaction. Likewise, the majority of these drafts, 46 in number or 74% of the total were presented by the sellers to their financial institutions within three days of the respective sale dates; 13 drafts, or 21%, were presented on the day of sale; 18 drafts or 29%, were presented the day following the sale; and 15 or 24% were presented on the second day following the sale. (TR, Vol. I, 144, 146; CX 6, pp. 1-3)

11. The record discloses that on some occasions, the sellers' financial institution, upon the presentation of Shasta's drafts by the sellers, granted immediate credit of the amount of the draft to the seller. However, this procedure appeared to be dependent upon the sellers' status and upon the policies of the financial institutions to maintain good customer relations. (TR, Vol. I, 85; Vol. II, 40-41, 94)

12. Shasta has at various and sundry times issued checks for the payment of livestock (TR, Vol. I, 136) and has, at other times issued drafts. (RX 1; TR, Vol. I, 175, 177; Vol. II, 14, 98) Shasta discontinued the issuance of drafts, without the prior consent of the sellers, on January 1, 1988. (TR, Vol. I, 162, 172; Vol. II, 22) Shasta has, as a policy, always promptly paid drafts. (TR, Vol. I, 161, 163) Shasta issued drafts as these instruments protected it from the sellers of livestock, gave Shasta the ability to make adjustments on livestock purchases and reduced Shasta's exposure to fraud by its employees or other buyers. (TR, Vol. I, 176, 188)

13. Shasta's preferred method of paying for its livestock purchases was by draft as these instruments obtained for Shasta a delay prior to disbursement of funds during which records of cattle liens could be verified. (TR, Vol. II, 23) This method of business was the manifestation of intent by Mr. Ellington Peek. (TR, Vol. I, 176)

14. Mr. Ellington Peek testified that he had attempted to obtain compliance with the Department's orders described in Finding 15 by requesting that Shasta's cattle supplier execute written agreements evidencing consent to the use of drafts for livestock purchases. Mr. Peek further testified that this effort was discontinued because, "It got to be such a hassle," and "... we just quit using them because it was such a pain in the neck." (TR, Vol. I, 180, 187) However, it appears that Mr. Peek's efforts were not pursued with vigor as his buyers, employees and customers were unfamiliar with these agreements. (TR, Vol. II, 13, 20, 51) Shasta's consignors were initially requested in January, 1988 to execute agreements consenting to the payment of cattle purchases by draft. (TR, Vol. II, 51; RX 4)

15. It was the testimony of the Department's official responsible for expressions of sanction policies, that the respondents' use of drafts without the prior written consent of the cattle sellers was an unfair practice, and that further, the use of drafts delayed payment to the sellers, with the result that serious violations of the Act were perceived. Therefore, severe sanctions were recommended especially in view of the Department's prior orders and warnings. (TR Vol II, 101-2) The previous order issued March 12, 1971, required that Shasta and its officers, directors, agents and employees cease

and desist from, among other things, "... failing to pay, when due, the full purchase price of livestock purchased in commerce . . . ." This order (P&S No. 4386) suspended Shasta's registration for 14 days. (CX 2) The Department's warning letter dated December 13, 1978, advised the individual respondent that the issuance of drafts in payment for livestock purchases without the prior written agreement of the seller was a violation of 9 C.F.R. § 201.43(b). (CX 3) The previous order, issued December 19, 1980, required that Shasta and its officers, directors, agents and employees cease and desist from, among other things, "Issuing drafts in payment for livestock purchased without having previously obtained and maintained in their records express written agreements with their sellers for payment for such livestock by draft." This order (P&S No. 5783) suspended Shasta's registration for 21 days, imposed a civil penalty of \$15,000 on Mr. Peck and prohibited his participation in Shasta's business for two months. (CX 4) Another previous order, also issued on December 19, 1980, required that Shasta and its officers, directors, agents and employees cease and desist from, among other things, "Inserting or failing to insert in accounts of purchase . . . or any other document prepared in connection with the purchase or sale of livestock any entry, statement or information where such insertion or omission results . . . in a false or inaccurate record on such livestock purchase or sale transaction." This order (P&S No. 5709) suspended Shasta's registration for 21 days and prohibited Mr. Peck's involvement in the business for two months. (CX 5)

16. The record also contains evidence of Shasta's significant size (Finding 5), the substantial economic hardship which might visit Shasta, its owners, officers, and employees, as well as the cattle buying and selling industries in the communities within which Shasta does business should Shasta's license be suspended as a result of this proceeding, (TR, Vol. II, 34, 42, 46, 53, 63, 69, 78, 90, 96) and a stipulation that the imposition of a \$10,000 civil penalty as a sanction in this matter would not impair Shasta's ability to remain in business. (TR, Vol. I, 111)

### Conclusions

#### Alter Ego Theory

The respondents' answer denies that Mr. Peck is, in fact, the *alter ego* of Shasta. However, proof by the testimony in this record, offered primarily by respondents' counsel, revealed that the conduct of Shasta's affairs had been successfully managed due to the confidence which both buyers and sellers had in the integrity displayed by Mr. Peck.

"The purchase and sale of western livestock was a business which was

A. Everything. Any -- anytime -- We never had a written agreement with him, but he always, whatever he told us on the phone, or whenever we saw him, that was it. 'Cause I know one -- a couple of times the market really dropped, and he could have backed out, 'cause we had no written agreement, but we got what the deal was.

Q. So you never felt it was necessary for you to have a written contract with Mr. Peek in your business dealings?

A. Never.

Q. His word's his bond?

A. That's why we deal with him. (TR, Vol. II, 90-91)

This reveals that the commitments of Mr. Peek were the commitments of his corporation, the corporation which he essentially owned and managed. (Findings 3, 4) It is therefore appropriate to conclude that the corporate respondent was the *alter ego* of the individual respondent, for all of the financial transactions were those of the corporate respondent, directed by the individual respondent.

The establishment of Shasta as the *alter ego* of Mr. Peek, is a question of fact. *Wolfe v. United States*, 798 F.2d 1241, 1243 Ptn. 2 (9th Cir. 1986).

"Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy." *Bangor Punta Operations, Inc. v. Bangor & Aroostock Railroad Co.*, 417 U.S. 703, 713, 94 S. Ct. 2578, 2584.

Additional clarification of this principle was expressed in *McKenney v. Gannett Co.*, 817 F.2d 659, 666 (10th Cir. 1987):

"The *alter ego* theory has been adopted by courts in those cases where the idea of separate corporate status has been used to work an injustice . . . Piercing the corporate veil through the *alter ego* doctrine is an equitable remedy."

Accordingly, the order entered herein will be equally applicable to both the corporate and individual respondents. *Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983, 984-86 (9th Cir. 1971); *Great America Veal, Inc.*, P&S No. 5998, 48 Agric. Dec. \_\_\_, slip op. at 24-25 (January 19, 1989).

#### Negotiable Instruments

The Department's complaint alleges that Shasta, under Mr. Peek's control, purchased 1,443 head of livestock in July and August of 1986 for the total amount of \$645,287, and in payment thereof, issued drafts to the sellers

without having obtained the sellers' written consent to the use of drafts prior to the dates on which these cash transactions occurred. The respondents' answer admitted that Shasta did indeed issue drafts in payment of these specific transactions, and that these drafts were not checks. The testimony in this matter further reveals that it was the respondents' preference to pay for all cattle purchases by the tender of drafts and that such method of doing business was followed from at least July of 1986 through December of 1987. The Pre-Trial Brief filed by respondents' counsel on August 1, 1988, contained further admissions that: "This is a case in which a dealer promptly paid sellers of livestock with a draft, and that form of payment was acceptable to the sellers." (Brief, p. 1) Respondents' counsel further admitted in an opening statement at the commencement of the hearing on August 16, 1988, that: "This is a case where a prudent business enterprise, the Respondent, has used drafts, which is in common use in the industry, and which was not outlawed by the Act." (TR, Vol. I, 5)

Upon the conclusion of the hearing, respondents' counsel then presented argument that the instruments by which the respondents paid for cattle were not drafts, and indeed were checks and that therefore, no violation could exist. (Respondents' Proposed Findings of Fact, Conclusions of Law and Brief in Support, p. 13, November 1, 1988) Complaint counsel continued to argue, of course, that respondents' negotiable instruments were not the same as checks, and did not constitute timely payment of livestock purchases under the Act. (Complainant's Proposed Findings of Fact, Conclusions and Order, and Brief in Support Thereof, p. 7, October 31, 1988)

The strength of an admission made by a respondent is recognized by the Department's Rules of Practice Governing Formal Adjudicatory Proceedings at 9 C.F.R. §§ 1.136, 1.139, *Mike Robinson*, P&S No. 6945, slip op. at 6 (May 27, 1988); *Joe L. Henson, D.M.V.*, A.Q. No. 264, 45 Agric. Dec. 2246, 2250 (1986). Admissions in pleadings have the force and effect as if the facts admitted were received as evidence without objection. Here, admission was made in respondents' answer that the instruments in question were drafts. This is an admission to an ultimate fact in this matter. Therefore, the legal conclusion is that Shasta's instruments were indeed drafts, for it has long been the rule that an admission in an answer is binding until withdrawn by a proper amended or supplemental pleading. This standard has been steadfastly followed, even through the current Federal Rules of Civil Procedure, Rule 8(d).<sup>5</sup> *Action Mfg. Inc. v. Fairhaven Textile Corp.*, 790 F.2d 164, 165 (1st Cir. 1986); *PPX Enterprises, Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 123 (2d Cir. 1984); *Brown v. Tennessee Gas Pipeline Co.*, 623 F.2d 450, 454, (6th Cir. 1980); *Gebhard v. Royce Aluminum Corp.*, 296 F.2d 17, 20 (1st Cir. 1961); *Freedman Nat'l Bank v. Northern Illinois Corp.*, 202 F.2d 601, 605 (7th Cir. 1953); *Smith v. Chapman*, 436 F. Supp. 58, 62 (W.D. Texas 1977), aff'd 614 F.2d 968 (5th Cir. 1980).

<sup>5</sup>The Federal Rules of Civil Procedure are not followed in proceedings before the Department of Agriculture.

**Violations of 7 U.S.C.A. § 228b  
and 9 C.F.R. § 201.43(b)**

The Act requires that those who purchase livestock in commerce, pay for their purchases in a timely fashion. The law specifically requires, at 7 U.S.C.A. § 228b(a), that market agencies and dealers deliver to sellers the dollar amounts involved in cattle transactions no later than the day following the sale and purchase. The Department's Regulations,<sup>6</sup> 9 C.F.R. § 201.43(b), have mapped the route which the industry is expected to follow in obtaining Congress' goal. These directions eliminate any uncertainty as to the form of payment which must be received by the seller "... before the close of business of the next business day." This regulation requires that livestock purchases are not to be paid for with drafts which are not checks unless, as permitted by 7 U.S.C.A. § 228b(b) the seller has consented to the acceptance of this type of negotiable instrument prior to the transaction.

The Department has provided further illumination at 9 C.F.R. § 203.16 of the form of payment which is required by livestock purchasers. This regulation permits that payment may be made by check through the mails, should the seller choose to be not present at the point of transfer of possession of livestock. This regulation further provides that:

If the seller, for reasons other than not being present to receive payment, prefers to have the packer, market agency, or dealer make payment by mailing a check within the time limit as provided in section 409(a),<sup>7</sup> he may . . .

(b) The Packers and Stockyards Administration believes that such an agreement would not constitute an extension of credit within the meaning of section 206<sup>8</sup> of the Act because it would not give the purchaser any more time to issue a check than is provided in section 409(a).

The legislative history of the prompt payment provisions of the Act further reveals an intent that checks were intended to be the form of payment for cattle purchases.

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<sup>6</sup>These regulations are the valid expressions of the Secretary, issued pursuant to the Act at U.S.C.A. § 228. The regulations are considered interpretive, advisory rules. *Farrow v. U.S. Dep't of Agriculture*, 769 F.2d 211 (8th Cir. 1985); *U.S. v. Donahue Bros., Inc.*, 59 F.2d 1019, (8th Cir. 1932); *Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 135-136 (1978). However, laws vesting jurisdiction in particular agencies are often subjected to interpretation by those agencies. And, too, those interpretations must be adopted by reviewing courts. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *Meat Vende Const. Co. v. N. Cal. at. Council*, 861 F.2d 1124 (9th Cir. 1988)(en banc).

<sup>7</sup>Section 409 is codified at 7 U.S.C.A. § 228b.

<sup>8</sup>Section 206 is codified at 7 U.S.C.A. § 196.

The Act became law in 1921 in response to the marketing conditions in the livestock and packing industries as they then existed. Subsequently, changes in conditions enhanced the exposure of ranchers and stockmen to the vicissitudes of their customers' financial dealings. In 1975, one of the nation's 10 largest packers went bankrupt, forcing its suppliers of cattle to face losses exceeding \$20 million. Congress' reaction to this calamity resulted in the legislation which leads to the center of this litigation.

In the amending legislation,<sup>9</sup> Congress determined that those who produce livestock are worthy of unique protection, and so, created additional buffers for their preservation. These included the prompt payment requirements for livestock purchases.<sup>10</sup> The history of the amendment was partially revealed by the Committee of Agriculture and Forestry of the Senate, which favorably reported on H.R. 8410,<sup>11</sup> in the following language:

Section 7 of the bill adds to title IV of the Packers and Stockyards Act a new section 409 which, absent an express prior agreement in writing between the buyer and seller, requires each packer, market agency, or dealer purchasing livestock, before the close of the next business day following the purchase of livestock and transfer of possession thereof, to wire transfer funds to the seller's account or to deliver to the seller or his duly authorized agent, at the point of transfer of possession of the livestock, a check for the full amount of the purchase price. The delivery of a draft would not satisfy this requirement. In the case of a purchase on a carcass or "grade and yield" basis, the check or wire transfer of funds would be due not later than the close of the first business day following determination of purchase price. If the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, the packer, market agency, or dealer, is required to wire transfer or mail the full amount of the purchase price to the seller within the time limits of this section. Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the appropriate or prompt collection of funds shall be considered an "unfair practice" in violation of the Act.

The language here requires that "... each ... market agency, or dealer ... deliver ... a check for the full amount of the purchase price. The delivery of a draft would not satisfy this requirement."

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<sup>9</sup>Pub. L. 94-410, September 13, 1976.

<sup>10</sup>*Id.*, § 228b, which is section 409 of the Act.

<sup>11</sup>S. Rep. No. 932, 94th Cong.; reprinted in 1976 U.S. Code Cong. & Admin. News 2267, 2273-



The House Conference Report also revealed the following summary of amendments advanced to the Bill.<sup>12</sup>

**AMENDMENT NO. 31. - PROMPT PAYMENT BY  
PACKER TO SELLER'S "REPRESENTATIVE"**

The House bill adds to the Packers and Stockyards Act a new section 409 which requires that each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized agent the full amount of the purchase price.

The Senate amendment retains this provision but deletes the word "agent" and substitutes the word "representative".

The House receded.

**AMENDMENT NO. 39 - PROMPT PAYMENT BY PACKER  
WHERE SELLER OR DULY AUTHORIZED  
REPRESENTATIVE NOT PRESENT**

The House bill provides in new section 409 that, if the seller or his duly authorized representative is not present to demand payment at the point of transfer of possession, the packer, market agency, or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, etc.

The Senate amendment retains this provision but deletes the requirement that the seller or his duly authorized representative "demand" payment and provides instead that the packer, market agency, or dealer shall wire transfer funds or place a check in the United States mail if the seller or his duly authorized agent is not present to "receive" payment at the point of transfer of possession.

The House receded.

The statements by the bill's sponsors on the prompt payment provisions of this bill, both in the House,<sup>13</sup> and in the Senate,<sup>14</sup> reveal that payments by drafts were considered an impairment upon commerce and, so required that payments be made by checks or wire transfers of funds absent the seller's consent.

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<sup>12</sup>Id., 2285-86.

<sup>13</sup>122 Cong. Rec. Pt. 11, H 12862 (May 6, 1976) (Statement of Rep. Poage).

<sup>14</sup>122 Cong. Rec. Pt. 17, 17762 (May 17, 1976) (Statement of Sen. Huddleston).

<sup>15</sup>122 Cong. R.

The Congress' reports and markups of the pending bill indicated that it was intended that payment for livestock purchases be made no later than the day after possession is transferred and further provided that wire transfer funds or place payment checks in the mails should the seller or the seller's representative be not present at the point of transfer.<sup>15</sup> There is nothing in this history to support a contention that any type of payment method may be used, absent the sellers' agreement, in non-slaughter sales. The post-enactment statements by Representative Hightower, which comments are cited by respondents' counsel, do not provide a compelling interpretation of the work performed by the Congress of which he was but one member.

It is not a surprise, therefore, that with such a clear manifestation of Congressional intent, to find the following expression by the Circuit Court with jurisdiction of the geographic area within which Shasta conducts business:

Market agencies must pay for purchases by check. Payment by draft, which adds a day to the collection process, is not permitted unless the seller agrees before hand in writing. 9 C.F.R. § 201.43(b)(1982). *Blackfoot Livestock Commission Co. v. Dep't of Agriculture*, 810 F.2d 916, 921 (9th Cir. 1987)

The respondents, overlooking the admissions of their answer, argue that the instruments tendered as payment for livestock purchases should be considered as checks, contending that a draft is a check<sup>16</sup> if it is drawn on a bank and if it is payable on demand. (UCC § 3-104(2)(b); Cal. Commercial Code § 3104(2)(b)(West 1964). The instruments which Shasta tendered to its suppliers were imprinted with the legend "Bill of Sale Draft" or "Livestock Draft with Bill of Sale" and "Pay to the Order Of", and "Drawn On" thereafter followed by the handwritten name of a bank, or in some instances, with the printed name of Shasta's bank and the magnetically encoded numerals of Shasta's bank account. However, these instruments are considered to be drafts, as the bank upon which they were drawn, First Interstate Bank of California, did not in fact pay these instruments on demand.<sup>17</sup> An employee of this Bank testified that a check is a demand instrument which must be paid, absent legal technicalities, but that Shasta's drafts had to be approved prior to payment. (Finding 10; TR, Vol. I, 135, 144, 147). Additionally, the record contains copies of cashiers checks issued by First Interstate Bank itself to cover the collection for each of Shasta's drafts. There is no answer to the

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<sup>15</sup>1976 U.S. Code, Cong. & Admin. News 2267, 2277.

<sup>16</sup>The language of 9 C.F.R. § 201.43(b) provides that "No packer, market agency, or dealer shall purchase livestock for which payment is made by a draft which is not a check, unless the seller expressly agrees in writing." All checks are also drafts; but not all drafts are checks. Cal. Com. Code § 3104 (West 1964).

<sup>17</sup>Extrinsic evidence may be considered in determining the nature of a negotiable instrument if it is ambiguous on its face and statutory rules of construction cannot resolve the ambiguity. Cal. Com. Code § 3117 (West 1964); *Wilhelm Foods, Inc. v. Nat'l Bank of N.A.*, 382 F.Supp. 605 (S.D.N.Y. 1974).

question of why these cashiers checks were issued, if the instruments which Shasta tendered to its suppliers were indeed checks. (Finding 9).

The respondents advance another argument. They suggest that their livestock suppliers, i.e., the sellers, had indeed agreed in writing to accept the drafts which Shasta tendered as payment.

The exhibits<sup>18</sup> in this record reveal that the documents signed<sup>19</sup> by the sellers were entitled, "Bill of Sale Draft". The agreements made by the sellers were as follows:

Know all men by these presents; That I, the seller, signing hereunder and residing in the county of \_\_\_\_\_, State of \_\_\_\_\_, in consideration of the payment of the above draft, do bargain and sell and, by these present, do bargain and sell unto Buyer the herein described livestock: and hereby bind myself to warrant and defend the title to said livestock against any person claiming the same or any part of them: and further warrant that the livestock as described herein is free and clear of any encumbrance or lien whatsoever except those for which consent to said sell and release of said lien is endorsed on the draft as provided for herein.

An additional form used by respondent<sup>20</sup> was entitled "Livestock Draft with Bill of Sale" which contained the following boilerplate:

"I, the undersigned seller, in consideration of the sum of the payment of the foregoing, have and do hereby bargain, sell and deliver unto \_\_\_\_\_ the above described livestock, and hereby bind myself to warrant and defend the title to said livestock against the claims and demands of all persons whomsoever and further warrant that the livestock described above is free and clear from all encumbrances and liens whatsoever except those for which consent to said sale and release of any such encumbrances or liens is endorsed on the reverse side of this draft."

The bare language of these documents reveal them to be drafts with attached bills of sale. These documents do not reveal any consent to the agreement envisioned by Representative Poage, for the expressions of the sellers run to the marketable title of the livestock, not to the form of payment, and were clearly executed after Shasta had taken possession of the livestock. (Finding 7)

<sup>18</sup>CX 7, RX 10.

<sup>19</sup>122 Cong. Rec. Pt. 11, 11 12863 (May 6, 1976) (Statement by Mr. Poage, who indicated that the seller and buyer could agree to any form of payment, so long as the agreement was in writing and signed by the seller, even "... on the sales slip ...").

<sup>20</sup>RX 1.

There is a very substantial reason for the sellers to have avoided the execution of any document which might be construed as an agreement to accept a draft, which by practice and intent introduces payment delays and a possible waiver of the right to receive payment within one day of the transaction date. Sellers, should they be dealing with a packer, would be loopy of such a waiver, for such could be construed as a willingness to become a creditor-supplier, thereby erasing the protection of the trust fund provision of the Act.<sup>21</sup> The language which induces suspicion is found in the Senate Committee Report<sup>22</sup> as follows:

If, however, the agreement is for payment beyond the close of the next business day, the producer would be considered a credit seller and as such would forfeit his rights under the trust.

This record contains further evidence of a violation of the Act, specifically expressed at 7 U.S.C.A. § 228b(c).<sup>23</sup> This evidence reveals that Shasta's officers and employees purposefully issued drafts in order to delay the collection of funds by their suppliers. This delay was desired, in part, so that Shasta's employees would have ample time to verify the lien - and mortgage-free character of the livestock which had been delivered to Shasta. (Findings 7, 12) While this may have been an admirable business practice, it ignores the *per se* proscriptions of this section of the Act, *Beef Nebraska, Inc. v. U.S.*, 807 F.2d 912 (8th Cir. 1986), affirming *Beef Nebraska, Inc.*, 44 Agric. Dec. 2786 (1985); *Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234, 248 (1986); *C. Z. Edwards*, 37 Agric. Dec. 1880, 1887 (1978), and discounts the protection offered by both the Federal<sup>24</sup> and state agricultural products lien list laws.

There is no doubt that the use of drafts by Shasta did result in the delay of payments to the sellers. The record indicates that Shasta created a method of payment by which it gained a delay during which it had both the sellers' cattle and money. A statistical review of a sample of Shasta's drafts issued during the summer of 1986 reveals that a substantial majority were paid between five and eight days after the transactions, whereas the majority of the drafts were presented for collection within three days after the transactions. (Finding 10) The testimony indicates that but one to two days are required for banks to collect checks, the time for their normal float. (TR, Vol. I, 82)

The use of drafts to pay for livestock purchases, lacking the sellers' consents, has been repeatedly condemned, as a practice prohibited of itself,

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<sup>21</sup>7 U.S.C.A. § 196, which is section 206 of the Act, as amended by Pub. L. 94-410, September 13, 1976.

<sup>22</sup>1976 U.S. Code Cong. and Admin. News, 2278.

<sup>23</sup>See pages 2-3 hereof.

<sup>24</sup>For example, see 7 U.S.C.A. § 1631 which had become effective shortly prior to January 1, 1987.

id as a procedure which leads to the failure to pay, when due, for those purchases. *Blackfoot Livestock Commission v. U.S. Dep't of Agriculture, id.*

# Violations of 7 U.S.C.A. § 213(a)<sup>25</sup>

Failure to pay, when due, the full purchase price of livestock constitutes an unfair and deceptive practice in violation of the Act as expressed at 7 U.S.C.A. § 213(a), 228b. *Bowman v. U.S. Dep't of Agriculture*, 363 F.2d 81 85 (5th Cir. 1966); *Edward Tiemann*, P&S No. 6780, Agric. Dec. \_\_\_, October 20, 1988; *Hammers & Ranchers Livestock Auction, Inc., id.*; *Trenton Livestock, Inc.*, 41 Agric. Dec. 1965 (1982); *Richard N. Garver*, 45 Agric. Dec. 1090, 1095 (1986), *aff'd sub nom, Richard Garver v. U.S. Dep't of Agriculture*, 846 F.2d 1029 (6th Cir. 1988), *cert. denied*, 109 S.Ct 63 (1988); *C. J. Edwards, id.*; *Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 561-62 (1977), *aff'd sub nom, Van Wyk v. Bergland*, 570 F.2d 701, 704-05 (8th Cir. 1978); *Milton Bryan*, 36 Agric. Dec., 17, 42 (1977).

Respondents' counsel contend, with commendable enthusiasm, that, since the record does not display the existence of injury, the Act was not violated by these respondents. This argument follows the perceived precedent established in *Corona Livestock Auction, Inc. v. U.S. Dep't of Agriculture*, 607 F.2d 811, 814, Ftn. 6, (9th Cir. 1979) and in *Central Coast Meats, Inc. v. U.S. Dep't of Agriculture*, 541 F.2d 1325, 1328 (9th Cir. 1976). However, this perception does not exculpate these respondents from the results of their business practices.

These two cases deliver the same message from the 9th Circuit Court of Appeals: in both, the reviewing court looked for evidence of a substantial character which could support the finding of likely injury, to those who sold cattle through the market agency, or to the packer. A finding of actual injury was not required to support a conclusion that the statute had been violated. This standard was applied in *Corona, id.*, a stockyard case involving allegations of violations of 7 U.S.C.A. § 213(a) and in *Central Coast, id.*,<sup>26</sup> a packer case involving allegations of violations of 7 U.S.C.A. § 192(a).<sup>27</sup> Further application of this standard was obtained by the Ninth Circuit in two subsequent cases. In *Bowma v. U.S. Dep't of Agriculture*, 754 F.2d 804, 808-09 (9th Cir. 1984), the court concluded that where the questioned conduct is *per se* proscribed, it is only required to determine if the practice is "unfair" or

<sup>25</sup>Section 312(a) of the Act.

<sup>26</sup>Subsequently, the Department's Judicial Officer offered this comment in *Sterling Colorado Beef Co.*, 35 Agric. Dec. 1599, 1602 (1976):

Respondents rely in their brief on the decision in *Central Coast Meats, Inc. v. United States*, No. 74-1302 (C.A. 9), reversing my decision in *re Central Coast Meats, Inc.*, 33 Agr Dec 117 (1974). The Court of Appeals divided two to one, and I have not changed my views as a result of that split decision. Accordingly, the views set forth in my opinion reflect the present policy of this Department.

<sup>27</sup>See also: *DeLong Packing Co. v. Dep't of Agriculture*, 618 F.2d 1329, 1336-37.

"deceptive" absent a more specific showing of actual harm. In *Spencer Livestock Com'n v. U.S. Dep't of Agriculture*, 841 F.2d 1451, 1455 (9th Cir. 1988), the court wrote:

Thus, under the *Central Coast* rule, we uphold a finding of a § 213 violation where the evidence establishes a deceptive practice, whether or not it harmed consumers or competitors.

In this present case, involving respondents acting as both dealers and market agencies, substantial evidence exists to support the conclusion that payments to the ranchers and cattlemen were intentionally delayed and that such delays not only were a *per se* violation of 7 U.S.C.A. § 228b(a) and (c) but also were unreasonably unfair practices in contravention of 7 U.S.C.A. § 213(a). Findings 11, 12, and 13 reveal that Ellington Peck intentionally adopted a method of payment which, of its inherent nature, deferred payments for livestock purchases. The statute requires payments. It does not permit non- or slowed-payments. It does not allow for non-compliance based on excuses which may indeed require compassion, or, even be admired for business considerations. *Blackfoot Livestock Com'n Co. v. Dep't of Agriculture* *id.*; *Beef Nebraska, Inc. v. U.S.*, *id.*; *Van Wyk v. Bergland*, *id.* The evidence shows that the majority of those persons selling cattle to Shasta desired and attempted to obtain payment on the date of the transaction or shortly thereafter. The evidence also shows, however, that payments were not authorized and dispatched to a majority of those persons until delays of between 2 to 5 days had been incurred. (Finding 10) The results of this procedure obtained possession of the sellers' cattle and at the same time enabled Shasta to retain the proceeds of the transaction. This practice, displayed in the record, can hardly be considered "... on the square ...,"<sup>28</sup> and it displays the injury which Congress sought to avoid by the proscription expressed at 7 U.S.C.A. § 213(a).

In *Van Wyk v. Bergland*, *id.*, the court wrote, in sustaining a conclusion of violation of Sec. 312(a):

Timely payment in a livestock purchase prevents the seller from being forced, in effect, to finance the transaction. By insuring that the seller will receive the fair market value of his livestock, undiminished by the cost of financing the sale, the requirement that a purchaser make timely payment fulfills the purpose of the Act. 570 F.2d at 704.

And, in *Bowman v. U.S.*, *id.*, the court considered the remedial character of the Act, liberally construed congress' intent and concluded: "Failure to pay would be a proscribed *deceptive practice* under § 213(a) . . . ." (emphasis added)

<sup>28</sup>The Congress intended that packers buying livestock would exercise this standard in the conduct of their businesses. This intent was manifested by a proponent of the original Act. 61 Cong. Rec. Pt. 2H 1868 (May 27, 1921) (Statement of Rep. Voight)

### Sanction

The Act, at 7 U.S.C.A. § 213(b) provides for the imposition of cease and desist orders, as well as for the imposition of civil penalties in the amount of \$10,000 for each violation of the Act at 7 U.S.C.A. § 213(a). The Act, at 7 U.S.C.A. § 204, also provides that a violator's registration<sup>20</sup> to operate may be suspended for a reasonable specific period. These explicit provisions are directly applicable in this case and, as permitted by the Administrative Procedure Act, *id.*, will be here applied.

The sanction recommended by witnesses called by complaint counsel would suspend Shasta as a registrant under the Act for a period of 28 days and impose a civil penalty, assessed against respondents jointly and severally, in the amount of \$10,000.00. This recommendation, though entitled to great weight, is not controlling. *Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 90, 634. Complainant's proposed sanction is inappropriately modest given the flagrant character of respondents' violations and the scale on which they were committed. The imposition of a brief suspension and a small civil penalty in this case would almost certainly fail to deter respondents from engaging in unlawful practices in the future. Furthermore, it would be likely to encourage other large concerns to engage in massive and profitable violations of the Act with impunity. Such a result would impair the effectiveness of the Packers and Stockyards Act regulatory program, to the detriment of the livestock industry as well as the public interest. Accordingly, complainant's proposed sanction must be magnified.

The order herein has four basic elements: it prohibits the respondents from future violations of the Act and regulations; it imposes a \$10,000 civil penalty; it suspends the Department's registration of Shasta's business operations for 180 consecutive calendar days, except those associated with the delivery of stockyard services may continued unimpeded; and, it imposes a ban on Ellington Peck's participation in the business of Shasta for one year.

This order entirely comports with the congressional mandate of the Act and with the copious expressions of interpretive precedent. The order further reflects the history these respondents have experienced with the Act, and the Department's efforts to obtain compliance by these respondents. Mr. Peck and Shasta have repeatedly had notice<sup>21</sup> that drafts are to be used to pay for livestock only under certain conditions. There are enumerated herein numerous expressions advanced prior to the issuance of the complaint that the complained-of practice was to be avoided. These include the Act itself, the Department's regulations, clearly expressed legislative history, both in the Senate and in the House, and, once by the Ninth Circuit Court of Appeals, *Blackfoot Livestock Commission Co. v. Dep't of Agriculture, id.*). Furthermore, the findings herein indicate that Shasta and Mr. Peck, by a 1971

<sup>20</sup>See Pin. 1 herein.

<sup>21</sup>The *Blackfoot, id.* decision was issued on February 20, 1967. It is noted again that the complaint was issued December 7, 1967. Respondents did not discontinue the use of drafts until January 1, 1968.

order, agreed to avoid the slow payments to its suppliers. Additionally, the respondents received a letter in 1978 advising it, that payments by drafts should be discontinued, and in 1980, the respondents agreed by a Department order to cease the issuance of drafts in payment for livestock purchases.

Mr. Peck clearly knew what was required of him and of Shasta. He discarded that obligation as not being worth the "... hassle ..." (TR, Vol. I, 180, 187). Mr. Peck has displayed an intent and a willfulness,<sup>31</sup> in the violation of the Act and regulations and will thus be subjected to sanctions more severe than recommended by the Department.

The Department's sanction policy has been often expressed. Failure to pay, when due, for livestock purchases, has been viewed as a serious violation of the Act. This policy was encapsulated in *Braxton M. Worsley*, 33 Agric. Dec. 1547, (1974) and was the subject of the following, as a footnote number 3 in *Spencer Livestock Comm'n v. Dep't of Agriculture*, *id.* 1456.

*See In re Catanzaro*, 35 A.D. 26, 31-32 (1976), *aff'd mem.*, 36 A.D. 467 (9th Cir. 1977); *In re Collier*, 38 A.D. 957, 971-72 (1979), *petition for review denied*, 624 F.2d 190 (9th Cir. 1980) (*per curiam*); *In re Blackfoot Livestock Comm'n Co.*, 45 A.D. 590, 633 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers and Ranchers Livestock Auction*, 45 A.D. 234, 257 (1986).

The JO routinely makes reference to the cases cited above as a sustaining of the severe sanction policy. *See, e.g.*, Decision and Order at 207, n. 56.<sup>32</sup> While it is true we have upheld the Department's choice of sanction in these cases, we have never expressly "sustained" the severe sanction policy. In *Blackfoot*, we upheld the JO's authority to increase sanctions proposed by the ALJ, and noted that *Blackfoot's* infractions "warrant[ed] a severe sanction." *Blackfoot*, 810 F.2d at 922. In *Catanzaro* and *Collier* we affirmed the JO's actions, but both were

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<sup>31</sup>In these circumstances, it is not necessary to address the so-called willfulness issue due to the presence of the warnings delivered by the Department prior to the filing of the complaint. The testimony on this point is quite straightforward. Mr. Peck's counsel asked:

You'd been on notice prior to 1986 for the P&S Administration that they deemed the use of drafts by Shasta Livestock Auction Yard without your having a prior written statement from the seller to be against the regulations; is that true?

Mr. Peck replied:

I think so. (TR, Vol. I, 179-180)

Additionally, the respondents did not modify the objectionable practices for 12 months after the filing of the complaint. *See Parshman v. U.S. Dep't of Agriculture*, 852 F.2d 858, 865 (6th Cir. 1988), affirming *Robert E. Parshman*, 46 Agric. Dec. 791, 838 (1987). Therefore, the facts of this record display compliance with the Administrative Procedure Act, *id.*, so as to permit the imposition of sanctions.

<sup>32</sup>The "... Decision and Order at 207 n. 56 ..." to which the court refers in this note is that issued in *Spencer Livestock Comm'n*, 46 Agric. Dec. 268, 431 (March 19, 1987).



memoranda dispositions, and therefore inappropriate for citation as precedent. Nonetheless, since *Catanaro* was published in the Agricultural Decisions reporter service, the JO has repeatedly relied on it as authority for his severe sanction policy. So have two practice manuals in the field. See 10 N. Harl, *Agricultural Law*, § 71.19(2) at 71-246 & nn. 171-72 (1987); 1 *Agricultural Law* § 3.30 at 218 n. 80 (1981) (J. Davidson, ed.).

We will continue to review decisions of the JO case by case. Where a severe sanction is warranted, it will be upheld, but where it is excessive we will reverse. That we may affirm severe sanctions in a given case reflects our judgment solely as to the facts of that case, and ought not to be construed as a blanket approval of severe sanctions in general.

The facts of this case reveal that respondents willfully embarked and prosecuted a course which, by intention, delayed payments for livestock purchases, in spite of warnings from high authority. The facts further show, in comport with the requirements of the Act at 7 U.S.C.A. § 213(b), *Butz v. Glover Livestock Comm'n. Co.*, 411 U.S. 182, 185-86, 93 S.Ct. 1455, 1457-58, 36 L.Ed. 2d 142 (1973), and of *Bosma v. Dep't of Agriculture, id.*, that these sanctions may be imposed.<sup>33</sup> The respondents' practices involved many millions of dollars. The issuance of drafts, which were not accompanied by the sellers' consents, in 1986 and 1987, exposed the sellers to the exigencies of non-collection. An officer of the Department testified that the respondents' practices were considered a serious violation (Finding 15). This is obvious, for the use of drafts could permit the respondents to re-open negotiations for any element of the transaction, the most obvious being price, but most likely, to involve quality of cattle which were no longer in the possession of the seller. In these circumstances, the seller has been stripped of all bargaining power and can only wait for better luck next year. This is not to say that these respondents ever engaged in this activity, or even, ever contemplated it. But, these laws and regulations reach an entire industry, the members of which may not all enjoy a good reputation or impeccable credit ratings. And, since cattle sellers dealing with non-packers, as the respondents were here, do not have the protection of the trust provisions of the Act, (7 U.S.C.A. § 196) the sellers can only rely upon the prompt payment requirements of the Act (7 U.S.C.A. § 228b) to actually receive rewards for their labor. The evidence here showed that the majority of Shasta's drafts were presented for payment shortly after the transaction, and yet, payment and the delivery of purchasing power, rather than promises, was delayed on the average three to five days.

The record also displayed that respondents conducted a huge business, buying more than 800 head of cattle each and every day of the year. The dollar value of these transactions exceeded \$50,000,000 annually. Approximately one-half of its volume was obtained through Shasta's stockyard;

<sup>33</sup>See also *Holiday Food Service, Inc. v. Dep't of Agriculture*, 828 F.2d 1103 (9th Cir. 1987) for the application of these standards in a "packer" case.

the balance through country purchases. The testimony indicates that respondents justified the use of drafts for the country purchases, as large numbers of cattle were available for purchase at each of these remote locations. The testimony also indicates that if the seller had only 80-90 head of cattle ready for market, that such a seller would be best advised to sell the cattle at the yard. (TR, Vol. I, 183) However, the drafts were used by Shasta in payment to individual sellers for the purchase of as few as 5 head of cattle, and that of the 62 drafts identified as being tendered between July 1, 1986 and August 21, 1986, 29 were for the purchase of fewer than 80 head of cattle. (CX 6) This suggests the conclusion that these purchases were made at Shasta's stockyard.

However, the record does not disclose the days of the week that these drafts were issued, preventing an analysis of the number which might have been issued on Shasta's normal sale days. Therefore, the evidence does not support the conclusion that the sanction should restrict the stockyard's activities, especially in view of the potential hardship which might befall the ranchers and stock-sellers who have but relatively low volume transactions to complete. The order shall not proscribe Shasta's provision of stockyard services, for Shasta's illegal activities did not reach the functions of the stockyard, the closing of which would have an adverse impact on the local economy. (Finding 16) Thus, the authority granted by the Act at 7 U.S.C.A. § 204 will be exercised and the aspect of Shasta's business within which the illegal practices were displayed shall be closed for 180 consecutive calendar days. The imposition of this penalty recognizes that there are other markets and methods available to cattle sellers. (TR, Vol. II, 53, 77)

Mr. Peek and his Shasta are leaders of the livestock industry. Therefore, in order to isolate the corporate respondent from the illegal practices directed and effectuated by the individual respondent, Mr. Peek shall be disengaged from the business activities of Shasta for 365 continuous calendar days. These respondents must be visited with stern sanctions, for the industry must be regulated by the Department, not by whims of its individual participants.

Additional sanctions are authorized by the Act at 7 U.S.C.A. § 213(b), and they will be imposed. The respondents are prohibited from the performance of any act or practice which could be a violation of the Act expressed at 7 U.S.C.A. § 213(a) and 228b. A civil penalty in the amount of \$10,000 is also authorized and is imposed, recognizing that the respondents have stipulated that Shasta's business would not be overwhelmed by the payment of this amount. This stipulation, the grave nature of the violation, and Shasta's huge size permits the imposition of this penalty, *Bouma v. Dep't of Agriculture*, *id.*

The administrative processes are well known and have been often described to these respondents. They have previously been subjected to the Department's orders, and the orders have been ignored as not "...worth the hassle..." (Finding 14) There is no reason to require that the Department engage in multiple hearings with the same respondents in order to obtain compliance with the Act. Judicial efficiency should also be a feature of the Department's adjudicatory functions. The Supreme Court of the United States has noted, in another context, that "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by

encouraging people to ignore its procedures.\* *McKart v. United States*, 395 U.S. 185, 195 (1969).

Finally, while it is noted that Shasta discontinued the use of drafts as of January 1, 1988, (Finding 12) it must be stated that it is the consistent policy of the Department of Agriculture to issue a sanction order in disciplinary cases even though the respondent has ceased the practices which violate the Acts or regulations enforced by the Department or indeed has ceased or discontinued business. *Central Packing Co., Inc.*, P&S No. 6898, Decision and Order, February 14, 1989; *Johnson-Hallifax, Inc.*, P&S No. 6910, Decision and Order, February 23, 1988; *A. W. Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987); *Norwich Veal and Beef, Inc.*, 38 Agric. Dec. 214 (1979); *Raskin Packing Co.*, 37 Agric. Dec. 1890 (1978).

### Conclusions

The evidence which was offered and received in this case clearly and convincingly establishes proof of the essential allegations of the Department's complaint against respondents Shasta and Mr. Peck. This proof leads to the conclusion that Shasta may be considered the *alter ego* of Ellington Peck, and that Shasta bought and sold livestock in commerce for its own account and, bought and sold livestock in commerce as a market agency on a commission basis. These activities were conducted on a mammoth scale both at Shasta's stockyard near Redding, California and at distant loading areas. Substantial evidence establishes that Shasta paid for the purchase, on a cash basis, of significant volumes of cattle by the tender of drafts, which were not processed as checks, to sellers who had not executed written waivers expressing a willingness to accept drafts in payment prior to transactions dates.

This practice is concluded to have been violative of the Act as expressed at 7 U.S.C.A. §§ 213(a), 228b and the Department's regulations as expressed at 9 C.F.R. § 201.43(b).

Accordingly, based upon the evidence of record, the findings herein, the briefs and arguments of counsel, and conclusions herein, the following order is entered:

### Order

1. Respondent Shasta Livestock Auction Yard, Inc., its officers, directors, agents and employees, successors and assigns, directly or indirectly, through any corporate, or other device, and Respondent Ellington R. Peck, individually, or as a director, officer, agent or employee of the corporate respondent, directly or indirectly, through any corporate, or other device, shall cease and desist from:

A. The performance of any act or practice in violation of the Act, as expressed at 7 U.S.C.A. § 213(a), and

B. The performance of any act or practice in violation of the Act, as expressed at 7 U.S.C.A. § 228b.

2. Respondent Shasta Livestock Auction Yard, Inc., is immediately suspended as a registrant under the Act for 180 consecutive calendar days; except, Respondent Shasta Livestock Auction Yard, Inc., may continue the delivery of stockyard services, as that term is defined at 7 U.S.C.A. § 201(b).

3. Respondent Ellington R. Peek is immediately prohibited from participation in the management, direction or control of Shasta for 365 consecutive calendar days.

4. Respondent Shasta Livestock Auction Yard, Inc., and Ellington R. Peek are jointly and severally assessed a civil penalty of ten thousand dollars.

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision and Order shall become final without further procedure 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service, as provided in section 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.142 and 1.145).

[This Decision and Order became final July 2, 1989.-Editor]

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**In re: SHASTA LIVESTOCK AUCTION YARD, INC., and  
ELLINGTON R. PEEK.**

**P&S Docket No. D-88-23.**

**Motion Granted filed June 12, 1989.**

*Allan R. Kahan, for Complainant.*

*John W. Reese, Jr. and Gerard D. Elftink, for Respondents.*

*Motion Granted issued by Donald A. Campbell, Judicial Officer.*

Complainant and respondent, desirous of resolving the above-captioned matter without further proceedings, hereby stipulate to the withdrawal of their respective Petitions of Appeal and to the entry of a decision containing the Findings of Fact and Conclusions of Law set forth by the Administrative Law Judge in his Initial Decision and Order of April 24, 1989, but vacating the provisions contained in that Initial Decision and Order and substituting the provisions set forth hereinafter.

### **Order**

Respondent Shasta Livestock Auction Yard, Inc., its agents, officers and employees, directly or through any corporate or other device, and respondent Ellington R. Peek, individually or as an officer, agent or employee of the corporate respondent, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock; and
2. Issuing drafts in payment for livestock purchased on a cash basis.

Respondents Shasta Livestock Auction Yard, Inc., and Ellington R. Peck are jointly and severally assessed a civil penalty of Thirty Five Thousand Dollars (\$35,000.00).

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondents.

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In re: BUFORD "PETE" WATSON, JR., and BOBBY C. THOMAS.  
P&S Docket No. D-89-3.  
Supplemental Order filed April 26, 1989.

Peter V. Train, for Complainant.  
Respondent, Pro se.

*Supplemental Order issued by Dorothea A. Baker, Administrative Law Judge.*

On March 31, 1989, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondents as registrants under the Act until such time as they comply fully with the bonding requirements under the Act and the regulations.

Respondents are now in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued March 31, 1989, is terminated. The Order shall remain in full force and effect in all other respects.

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In re: SAM ODOM.  
P&S Docket No. 6866.  
Decision and Order filed May 4, 1989.

**Failure to pay - Issuing insufficient funds checks - Severe sanction policy.**

The Judicial Officer reversed Judge Baker's decision dismissing the complaint. The Judicial Officer ordered respondent to cease and desist from failing to pay when due for livestock and issuing insufficient funds checks, and suspended respondent for 5 years, but permitted a termination of the suspension order after 1 year if all livestock sellers are paid in full, and permitted respondent's employment by another registrant after 1 year. Adverse inference drawn because the respondent failed to testify and failed to offer any evidence on his behalf. Complainant established a *prima facie* case that respondent owed \$285,000 for livestock. Statements made by respondent's attorney in the answer, in letters, and at the hearing that there were valid offsets to respondent's debt cannot be considered as evidence. Respondent's claim that the subject of respondent's indebtedness for the livestock involved in this case was settled (after the hearing) by an agreement in a civil action relating to the same transactions, is not entitled to be considered since respondent failed to seek to have the hearing reopened to consider newly discovered evidence. The seriousness of a failure to pay for livestock explained. Severe sanction policy explained.

Edward M. Silverstein, for Complainant.  
Jack Bryant, for Respondent.

*Decision and Order issued by Donald A. Campbell, Judicial Officer.*

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*),<sup>1</sup> instituted by a complaint alleging that respondent (i) issued checks totaling \$101,490.55 in payment for livestock purchases, which were returned unpaid because of insufficient funds; (ii) failed to pay when due for livestock purchases totaling \$285,370.62; (iii) failed to pay for livestock purchases totaling \$285,370.62; and (iv) engaged in business as a dealer without having and maintaining adequate bond coverage.

An initial Decision and Order was filed on August 19, 1988, by Administrative Law Judge Dorothea A. Baker (ALJ) dismissing the complaint. On September 20, 1988, complainant appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>2</sup>

Based upon a careful consideration of the entire record, I agree with complainant's position on appeal as to all of the allegations of the complaint. A cease and desist order is being issued, together with an order suspending respondent's registration for 5 years, provided, however, that a supplemental order may be issued terminating the suspension after 1 year upon demonstration by respondent that all unpaid livestock sellers have been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the 1-year period of suspension.

### Findings of Fact

1. The respondent, Sam Odom, is an individual whose mailing address is P.O. Box 1, Cross Plains, Texas 76442.
2. At all material times, respondent was, and he remains:
  - (a) Engaged in the business of buying and selling livestock on a commission basis, and buying and selling livestock in commerce for his own account; and
  - (b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

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<sup>1</sup>See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1989 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Herl, *Agricultural Law*, ch. 71 (1980).

<sup>2</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

3. Respondent, on or about the dates and in the transactions set forth below, issued checks in payment for his livestock purchases, which checks were returned unpaid by the bank upon which they were drawn because respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when they were presented.

<u>Date of Transaction</u>	<u>Payee</u>	<u>Amount</u>
4/23/86	Gerald Darroh	\$ 34,033.39
4/24/86	"	35,398.23
4/24/86	"	<u>32,058.93</u>
Total		\$101,490.55

4. Respondent, on or about the dates in the transactions set forth in Paragraph 3 above, and in the additional transactions set forth below, purchased livestock and failed to pay, when due, the full purchase prices for such livestock. At the time of the hearing, the entire amount totaling \$285,370.62 (\$101,490.55 + \$183,880.07 = \$285,370.62) remained unpaid.

<u>Date of Transaction</u>	<u>Payee</u>	<u>Amount</u>
11/14/85	Gerald Darroh	\$ 32,417.19
11/22/85	"	22,925.32
04/30/86	"	32,651.68
05/01/86	"	29,875.09
05/06/86	"	31,541.92
05/07/86	"	<u>34,468.87</u>
Total		\$183,880.07

#### Conclusions

The ALJ dismissed the complaint on the ground that complainant failed to sustain the burden of proof, notwithstanding the fact that respondent failed to testify, and introduced no evidence on his behalf. Complainant, on appeal, did not challenge the dismissal of the complaint as to the inadequate-bond allegation and, therefore, that issue is not involved on appeal.

Complainant clearly established a prima facie case with respect to the insufficient funds checks and the payment violations. Complainant's investigator, Daniel L. VanAckern, testified that he investigated this matter, and obtained various records that were received in evidence. Complainant's Exhibit 1 is a tabulation of the three insufficient funds checks, totaling \$101,490.55, and Complainant's Exhibits 2-4 are copies of Gerald Darroh, Inc.'s, invoices to respondent, and respondent's checks to Gerald Darroh, Inc., that were returned because of insufficient funds. After the checks were returned because of insufficient funds, respondent stopped payment on the

checks, noting on the bank's form that he was doing so to settle feed bills and shortage of cattle (CX 2, p. 3; CX 3, p. 3; CX 4, p. 3).

Complainant's Exhibit 8 contains a tabulation of the additional six transactions totaling \$183,880.07, in which respondent failed to pay Gerald Darroh for additional livestock. Complainant's Exhibits 9-12 are copies of invoices for the first four of the six transactions referred to in Finding 4.

Although respondent's counsel *asserted* in his answer and at the hearing that respondent was not indebted to Mr. Darroh because of offsets, *no proof* of valid offsets was introduced at the hearing, and complainant's investigator testified that he was not able to find any evidence to support respondent's claim as to the offsets. Mr. VanAckern testified (Tr. 22-24, 33-38, 46-48):

Q. What happened after you served the subpoena on Mr. Odom?

A. After I served the subpoena on Mr. Odom I gave him until the next morning to furnish the records to me and I told him I would call him back that night, and I did, and he told me where I could get the records.

Q. And where was that?

A. Actually the attorney of Mr. Darroh in Abilene.

Q. And who was that?

A. It was Jeff Johnson at that time.

Q. And were you able to get access to the records at Mr. Johnson's office?

A. Yes, I did.

Q. What kind of -- let's go back for a second. Did you discuss with Mr. Odom why you wanted those records?

A. Yes, I did.

Q. And what did you tell him?

A. I told him that we received a complaint that he purchased cattle from Mr. Darroh and he failed to pay for it.

Q. And did Mr. Odom admit to having purchased those cattle?

A. Yes, sir.

Q. And did he admit owing Mr. Darroh the money?



A. He admitted owing the money, but he said there was an offset.

Q. And what kind of an offset was that?

A. He mentioned buying some feed, some feed for the cattle or something of this nature.

Q. Did he indicate whether or not feed records supported his claim that there was that offset?

A. Yes, sir.

Q. Okay. Now, you saw Mr. Johnson, Mr. Darroh's attorney, and got access to those records?

A. Yes, sir.

Q. What kind of records did you get access to?

A. Bank statements, canceled checks, deposit slips, invoices.

Q. And you reviewed all of those records?

A. Yes, sir.

Q. What did you do with regard to those records?

A. I copied those.

Q. You made copies of them?

A. Yes, I did.

....

Q. And you received access to this document [CX 12] from whom?

A. Jeff Johnson, the attorney for Mr. Darroh.

Q. And did Mr. Johnson indicate that these cattle had been paid for?

A. They had not been paid for.

Q. Turn to Complainant's Exhibit 13 and describe that document, please.

A. This is a partial tabulation of all the livestock that Sam Odom owes Gerald Darroh, Inc., and that has not been paid for [totaling \$285,370.62].

Q. Now, earlier you testified that Mr. Odom has indicated to you that he claimed some offsets against the amount that he owed Mr. Darroh for the cattle; is that true?

A. That's correct.

Q. And when you had that discussion, he indicated to you that there were certain records of his that supported his claim?

A. That's correct.

Q. When you went to see Mr. Johnson, did you get access to those particular records?

A. I had access to all the records that he said he had.

Q. Did Mr. Odom in your conversation indicate there was a particular record which supported his claim?

A. He said there was a little booklet that supported that.

Q. Did you find that booklet?

A. I found a booklet. I assume it was the one he was talking about. It was the only one that was there.

Q. And did you find any evidence in there which would have supported his claim that Mr. Darroh owed him in excess of two hundred thousand dollars?

A. No, sir.

....

#### CROSS-EXAMINATION

....

Q. All right. You went through all the records that were in Mr. Darroh's attorney's office, did you not?

A. Yes.

Q. And you find where Sam had purchased some two hundred and seventy-five, two hundred and eighty thousand dollars worth of cows from Darroh and Darroh says they haven't been paid for?

A. Yes, that's correct.

Q. And that's the material you put together for this exhibit, is it not?

A. Yes, sir.

Q. Now, did you make any investigation at any time as to the details of any of these particular transactions except just from looking at the records?

A. I asked Mr. Odom to furnish all the records pertaining to this. I asked if he could document the feed, to furnish it.

Q. And he said the documentation was in these particular records, did he not?

A. He said that was all the records he had.

Q. All right, sir. And you were unable, out of those records, to decipher the transactions about which Mr. Odom spoke, were you not?

A. I was unable to detect any offset.

Q. You didn't make any copies of any of the Odom documents, though, did you?

A. I made copies of everything, yes, sir.

Q. But you have brought no evidence in here reflecting anything from Odom's file, have you?

MR. SILVERSTEIN: Your Honor, I object. The witness didn't bring any evidence in here, I did. And the witness has no obligation to bring any evidence in.

Q. (By Mr. Bryant) Basically, my question Mr. VanAekern, is you just took it on face value, based on what you saw, that Sam Odom owed these people two hundred and eighty-five thousand dollars?

....

A. (By the witness) Okay. No, I didn't take it at face value. I reviewed the records of what I could determine, what was there. I just couldn't find anything to substantiate it [the alleged offsets], sir.

Q. In your conversation with Mr. Odom, Mr. Odom told you that he didn't owe Darroh any money, did he?

A. I don't know if he said he didn't owe him any money, he said -- it was a question, yes.

Q. In the exhibits that you have brought, or that were presented here that I believe are part of the items that you copied, did you notice any notations on the stop payment orders concerning the reason for stop payment?

A. Yes, sir there is a notation on there.

....

Q. Do you recall what the notation was on the stop payment order?

A. Yes, sir.

Q. And what was it?

A. To settle a feed bill and storage [shortage] of cattle.

Q. Now, in arriving at the decision that you have just spoken of, that is, the decision that Mr. Odom owed two hundred and seventy-five or two hundred and eighty-five thousand dollars, did you take into consideration the reason given by Mr. Odom in the documents which you were copying for some of the nonpayment?

A. I asked him to furnish me the records to substantiate it.

Q. You did not feel that you had sufficient records at that time to substantiate it?

A. I was not given any records to substantiate it.

....

#### REDIRECT EXAMINATION

....

You are sure, again, that you and Mr. Odom discussed this claim that Mr. Darroh owed him money?

Yes, sir.

Q. Did he express a specific amount that he felt Mr. Darroh owed him?

A. I don't really recall, no.

Q. And he told you that all of the proof for the claim lied in those records that you were going to get access to in Mr. Johnson's office?

A. Yes, sir.

....

THE COURT: During our recess I was thinking about a matter which I will ask the witness to clarify, if he can, but if you do not know, just say you don't know and that will help.

You indicated that you were under the impression that the respondent, Mr. Odom claimed that there were offsets against this two hundred and eighty-five thousand dollars allegedly owed. Did you have any indication as to the extent of the offsets claimed as against the two hundred and eighty-five thousand dollars?

THE WITNESS: I never saw any figures that I'm aware of.

THE COURT: Very well. So, you have had no indication whether the offsets claimed were five thousand dollars or two hundred and eighty thousand dollars?

THE WITNESS: I have no indication of any offset.

In addition, Mr. Gerald Darroh testified that respondent agreed to pay for the livestock involved in this case in the spring of 1986, but that he later did not pay, contending that Mr. Darroh owed respondent for feed. Mr. Darroh did not think there was any way (even hypothetically) that respondent could have incurred such costs, testifying (Tr. 61-62, 64):

Q. And after those transactions took place, you continued to deal with Mr. Odom?

A. Yes, because he paid me. Maybe a little slow, but he paid.

Q. And you had substantial contact with him with regard to payments?

A. Yes, I did.

Q. And did you have any discussions with Mr. Odom with regard to payment in Spring of '86?

A. Yes.

Q. And he agreed to make payment?

A. Yes.

Q. And did you ever receive that payment?

A. No.

Q. Did you ever find out why?

A. Last time I talked to Sam he said, "You owe me for a lot of feed." I said, "Sam, I don't owe you for any feed." I said, "Give me a bill. Tell me how much?"

Q. And has he told you how much, to this day?

A. The only thing I have seen is the cross-complaint that he filed.

Q. And can you state the amount?

A. No, not on top of my head.

Q. Would you please state for the record about how many head of cattle or other livestock you sold to Sam Odom during the period in which you were dealing directly with him. An approximate number would be sufficient.

A. You know that's putting me pretty --

Q. I understand that.

A. I don't want to say.

Q. Was it more than a thousand?

A. Yes.

Q. Less than two thousand?

A. No, I'd said two thousand, a little more.

Q. Roughly two thousand?

A. I don't know, sir. Roughly two thousand head of cattle.

....

Q. Okay. Based on your personal knowledge, then, and assuming under this hypothetical that Mr. Odom received two thousand head of cattle from you, over this period of time, is there any way that he could have incurred costs of two hundred and eighty-five thousand dollars for all of those cattle?

A. No, sir, I don't think so.

The evidence offered by complainant clearly established a prima facie case supporting the allegations of the complaint as to respondent's payment violations. Respondent did not appear at the hearing to testify, and offered no evidence on his behalf to support any claimed offsets against the money he owed Mr. Darroh. Under the settled principle that has been followed in many proceedings before this Department,<sup>3</sup> and which has also been followed in many judicial proceedings,<sup>4</sup> I infer that respondent's testimony would have

<sup>3</sup>E.g., *In re Mendocino*, 48 Agric. Dec. \_\_\_, slip op. at 21-23 (Mar. 16, 1989); *In re Great American Veal, Inc.*, 48 Agric. Dec. \_\_\_, (Jan. 19, 1989), appeal docketed, No. 89-3108 (3d Cir. Feb. 22, 1989); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. \_\_\_, (Oct. 19, 1988) (order denying reconsideration), appeal docketed, No. 88-3214 (7th Cir. Nov. 15, 1988); *In re Minneapolis Livestock Market, Inc.*, 46 Agric. Dec. \_\_\_, (Aug. 13, 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 Agric. Dec. 234 (1986); *In re Grady*, 45 Agric. Dec. 66 (1985); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886 (1985); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand); *In re Patsy*, 43 Agric. Dec. 1406 (1984), aff'd, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984); *In re Javiez Produce Farms, Inc.*, 42 Agric. Dec. 1505 (1983); *In re Farrow*, 42 Agric. Dec. 1397 (1983), aff'd in part and rev'd in part, 760 F.2d 211 (8th Cir. 1985) (merits affirmed; suspension reversed); *In re Montes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, aff'd, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stampfer*, 42 Agric. Dec. 20, 32 n.4 (1983), aff'd, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 401-03 (1982), aff'd, No. 82-1157 (D.N.J. Jan. 24, 1983), aff'd mem., 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1597 (1981), aff'd, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), remanded, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), order on remand, 42 Agric. Dec. 726 (1983), aff'd, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), aff'd, 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), aff'd, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Furnis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), aff'd, 570 F.2d 724 (8th Cir.) (2-1 decision), cert. denied, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, aff'd mem., 582 F.2d 39 (5th Cir. 1978); *In re Burma*, 36 Agric. Dec. 1668, 1686-87 (1977), aff'd per curiam, 575 F.2d 1258 (8th Cir. 1978); *In re DeLong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), aff'd, 618 F.2d 1329 (9th Cir.) (2-1 decision), cert. denied, 449 U.S. 1061 (1980); *In re Loreiz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), aff'd per curiam, 558 F.2d 748 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Carca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), aff'd per curiam, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re S. B. Guiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

<sup>4</sup>2 Wigmore, *Evidence* §§ 285-91 (3d ed. 1940); *United States v. Di RB*, 332 U.S. 581, 593 (1948); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939); *Kirby v. Tallmadge*, 160 U.S. 379, 383 (1896); *Karava Company, Inc. v. Atlantic Export Corporation*, 588 F.2d 1, 9-10 (2d Cir. 1978); *International Union v. NLRB*, 435 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Milbank Ind. Ins. Co. v. Wentz*, 352 F.2d 592, 597 (8th Cir. 1965); *Cromling v. Pittsburgh & Lake Erie R*

been adverse to his interests here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch v. Archer*, Cowp. 66, quoted with approval in *Wigmore, Evidence* § 285 (3d ed. 1940).

There is no evidence in the hearing record to support the arguments made on behalf of respondent that there were valid offsets to the \$285,370.62 owed to Gerald Darroh for livestock received by respondent.

After Mr. Silverstein, complainant's attorney, concluded his presentation of complainant's case, Mr. Bryant, respondent's counsel, offered no evidence, and the ALJ announced that "the record is closed in this matter." Specifically, the record shows (Tr. 76, 78):

MR. SILVERSTEIN: We have nothing further, Your Honor.

MR. BRYANT: If the Court please, we would like to stand on the record.

THE COURT: Very well. That brings us, then, to a time for the consideration of the submission of the proposed findings of facts and proposed conclusions and proposed briefs.

....

THE COURT: Very well. If there are no additional matters, the record will reflect that Exhibits 1 through 14 were admitted and received into evidence, that the court reporter has received three copies thereof, that the parties have agreed to the dates for the submission of briefs and, accordingly, the record is closed in this matter.

In respondent's brief filed May 2, 1988, four months after the record had been closed, respondent's attorney asserted that counsel for respondent and for Gerald Darroh Cattle Company, Inc., settled their dispute. The brief states at page 2:

III. The Court is here advised that, on April 21, 1988, Counsel for Respondent and Counsel for Gerald Darroh Cattle Company, Inc., reached a compromise settlement agreement in which the alleged injured party would accept from Respondent, in full satisfaction of all claims against Respondent, such sum to be paid on or before May 11, 1988. The Court's attention is directed to her question to Counsel for

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Co., 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman v. CIR*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co. v. Staples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhofer v. Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles v. Lemin*, 151 F.2d 615, 619 (7th Cir.), cert. denied, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Reichig*, 108 F.2d 253, 256-57 (C.C.P.A. 1939); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 867-68 (2d Cir.), cert. denied, 304 U.S. 576 (1938).



Complainant appearing at Lines 22 through 24, of Page 13, of the transcript.

The ALJ's question to complainant's counsel, Mr. Silverstein, referred to in respondent's brief, is emphasized in the following quotation, which shows the question in its context (Tr. 13-14) (emphasis added):

THE COURT: Thank you, Mr. Bryant. Would you anticipate that the court might find that Mr. Odom doesn't owe any of these amounts that are alleged in that complaint?

MR. BRYANT: That is absolutely correct. The parties are joined. Complaints are filed by Mr. Darroh alleging the same figures that are involved in this transaction. Mr. Odom has filed a response to that saying that he doesn't owe Mr. Darroh anything, but if the finder of the facts determines that he does, he's ready to pay him.

We have done depositions in them. We have taken the deposition of Mr. Odom. We have taken the deposition of Mr. Gerald Darroh who, I believe, is present in the courtroom, and we still lack the taking of the deposition of Mr. Darroh's son, who was the party that was involved in most of the transactions that are involved. We still have that discovery to do. We aborted that discovery when we discovered we were not going to trial and I anticipate we will take those depositions in January or February in order to meet the court's discovery deadline. It is Mr. Odom's position he doesn't owe this man anything.

THE COURT: *Thank you very much, Mr. Bryant. Mr. Silverstein, what if what Mr. Bryant has described were to become a reality?*

MR. SILVERSTEIN: Your Honor, I have reviewed that situation with Mr. Bryant, I have reviewed the pleadings, and I have discussed it with the parties, and the department is satisfied that Mr. Odom does, in fact, owe Mr. Darroh the money that we have alleged.

I suggest to you, Your Honor, that if Mr. Odom wanted to dispute it, that Mr. Odom, in this proceeding had a perfectly good opportunity to appear here today and to testify to the fact that he did not owe Mr. Darroh the money.

I brought Mr. Darroh from Florida to Texas in order to meet that if it was necessary. Mr. Odom [, who lives in Cross Plains, Texas,] did not believe, I guess, that his appearance was necessary [at the hearing held in Dallas, Texas,] and so he does not appear to be in the courtroom. I suggest, Your Honor, that his failure to appear certainly, in my mind, at least, indicates to me that he is unwilling to get up on the witness chair and testify to those allegations. And I suggest to you,

that his failure to appear should enable you to draw a negative inference.

THE COURT: Very well. That concluded the opening statements of the parties, then. Mr. Silverstein, you are the attorney for the complainant, do you wish to proceed?

Subsequently, on May 24, 1988, respondent's attorney filed with the Hearing Clerk a letter, to which was attached a copy of a Motion to Dismiss, filed on May 19, 1988, in *Gerald Darroh Cattle Company, Inc. v. Sam Odom*, Civil Action No. CA-1-86-94-K (N.D. Tex.), together with an unsigned settlement agreement alleging that the parties have settled the matter by Sam Odom paying Gerald Darroh Cattle Company, Inc., \$15,000. Respondent's counsel's letter filed May 24, 1988, states: "The settlement has not preceded to the stage that the money has been paid, a settlement agreement is being circulated for signature and a Motion to Dismiss has been filed with the Court."

Complainant filed a Motion to Strike the Motion to Dismiss and Settlement Agreement, and respondent opposed the motion. The ALJ denied complainant's motion to strike in her initial decision filed on August 19, 1988 (Initial Decision at 3-5), and relied on the alleged settlement agreement in concluding that complainant has not borne its burden of proof. The ALJ held, in dismissing the complaint (Initial Decision at 8-9, 11, 13-14):

5. In view of the disposition of this matter through a Federal court proceeding, the complainant has not borne its burden of proof and has not shown that the respondent was obligated to make the payments which are the subject of this proceeding. The respondent insistently denied liability therefor and claimed instead that Mr. Darroh owed him. It indeed might partake of poor business judgment if someone was forced to pay \$285,000.00 to someone where there was a genuine issue in dispute. Subsequent facts have shown that the matter of payment to Mr. Darroh was the subject of a settlement agreement and release and that the sum of \$15,000.00 was paid to Mr. Darroh by the respondent. However, there is indication in the settlement agreement and release that it was not to be used for the purposes of showing that said \$15,000.00 was in payment for the livestock purchases set forth in

Darroh in payment for livestock purchases which checks were returned unpaid by the bank upon which they were drawn because the respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when they were presented, and that in additional transactions enumerated in the complaint, commencing on November 14, 1985 through May 7, 1986, the respondent purchased from Gerald Darroh livestock purchases in the total amount of \$183,880.07 (the burden of proof of showing that respondent owed these amounts has not been met. Payment was stopped, after dishonor on some of the checks.

....

There is merit to respondent's contention that by having this administrative proceeding prior to the determination of any amount which might have been due Mr. Darroh, in the United States District Court, the respondent was being deprived of the opportunity to dispute matters of genuine controversy . . . .

....

Complainant makes much of respondent's position of not adducing evidence at the hearing to rebut the complainant's evidence and that, "from his [respondent's] failure to testify, the Administrative Law Judge ought to conclude, by drawing a negative inference that his testimony would have supported the complainant's allegations . . . ." *J. A. Speight, et al.*, 33 Agric. Dec. 280 (1974). I do not believe it proper to draw such implications and conclusions in this case. The record is clear that there was pending Federal litigation relating to whether respondent owed anything to Mr. Darroh. It was respondent's privilege to not testify since he had no burden of proof on any matters.

The respondent was pursuing his legal right to have the matter of whether payment was due Mr. Darroh adjudicated in a Federal court which observes the Federal rules, procedures and evidence. The Department has indicated it doesn't, thus permitting a charging Agency a leniency as to proof that a Federal court might not abide. *In re: Hickey*, AWA Docket No. 369 (May 27, 1988) [*appeal docketed*, No. 88-7281 (9th Cir. July 22, 1988)] where the Judicial Officer indicated the procedural and evidentiary rules applicable in court proceedings are not applicable in administrative proceedings, and it is the Department's policy to make no effort to follow them.

Although complainant steadfastly maintains that respondent owed Mr. Darroh \$183,880.07 for livestock purchases, there is nothing irrelevant and immaterial with respect to the Federal litigation. It was reflected in the pleadings and set forth at the oral hearing. There

existed throughout the entire period of time involved, mutual accounts between respondent and Mr. Darroh. Respondent denied being indebted to Mr. Darroh and maintained there were offsetting accounts owed by Mr. Darroh to respondent and that respondent was ready to pay what was actually owed. Cause for failing to make timely payment cannot be ignored, and respondent should not be penalized because this case went to hearing before disposition of the Federal suit.

....

Even under lax rules of evidence, the principle of burden of proof is not meaningless. If this burden is not discharged in a persuasive manner so as to lead a reasonable person to conclude that a fact has been established, then, the alleging party should not prevail. I have not been convinced that respondent owed the \$183,880.07, alleged in the complaint. If he didn't owe it, then the insufficient fund checks do not take on significance.

My disagreement with the ALJ's disposition of this case stems from the fact that there is not one bit of *evidence*, as distinguished from *assertions* by respondent's counsel, that respondent had any valid offsets against the \$285,370.62 owed to Gerald Darroh for livestock. In fact, there is no *evidence*, as distinguished from *arguments* or *assertions*, that (i) the civil action involved the identical transactions alleged in the complaint, (ii) that a settlement agreement was signed by Mr. Odom and Mr. Darroh, or (iii) that the court dismissed the private litigation. *Statements* by respondent's counsel made in respondent's answer, at the hearing, in briefs, and in letters do not rise to the status of *evidence*.

If respondent had any evidence to dispute complainant's prima facie case, ample opportunity was afforded respondent to adduce that evidence at the hearing. Respondent, represented by capable counsel who stated that he has been involved "in some forty of these [Packers and Stockyards Act cases] over the last fifteen or twenty years" (Tr. 10), chose not to introduce any evidence to refute complainant's evidence. Since I am required by the Administrative Procedure Act and our Department's Rules of Practice to decide this case on the basis of *evidence*, I am compelled to hold that the undisputed evidence proves that respondent failed to pay for \$285,370.62 worth of livestock, and issued insufficient funds checks totaling \$101,490.55, as alleged in the complaint.

If any events occurred after the hearing that were relevant to the issues involved here, respondent could have filed a petition to reopen the hearing to consider newly discovered evidence. The Department's policy as to petitions to reopen a hearing is stated in *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 336-37 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), as follows:

Respondents' request to have the proceeding reopened for the purpose of receiving additional evidence is also without merit. Respondents concede that the additional evidence which they would

like to adduce could have been introduced at the earlier hearing, if they had recognized its importance. However, that is no basis for reopening a hearing. As stated in *In re King Meat Co.*, 40 Agric. Dec. 1910, 1910-11 (1981) (order denying reopening), *aff'd*, No. CV 81-6485 (Aug. 11, 1983), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished):

Respondent concedes that the evidence it would adduce was in its possession at the time of the original hearing, but was not considered of importance at that time. The case is identical, in this respect, to *In re DeLong Packing Co.*, 36 Agric. Dec. 1319, 1319-20 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980), in which it is stated:

The rules of practice provide that a "petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the final order" (9 CFR 202.21(a)(2)). Since respondent Hygrade's petition was filed after the issuance of the final order, it comes too late and is, therefore, denied.

But even if the petition had been timely filed, it would have been denied. A timely filed petition to reopen the hearing must "set forth a good reason why such evidence was not adduced at the hearing" (9 CFR 202.21(a)(2)). This administrative requirement is similar to the judicial practice regarding newly discovered evidence (*see United States v. Bransen*, 142 F.2d 232, 235 (C.A. 9)). In that case it was held (*ibid.*):

Subsequent discovery of the importance of evidence which was in the possession of applicant for new trial, at the time of the trial, does not entitle him to a new trial upon the ground of newly discovered evidence.

"Under this type of procedural rule, a proceeding will not be remanded if a party had full opportunity to present evidence at the original hearing, but failed to do so (*National Labor R. Board v. Weirton Steel Co.*, 135 F.2d 494, 497 (C.A. 3); *National Labor R. Board v. Aluminum Products Co.*, 120 F.2d 567, 573 (C.A. 7)."  
*In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 795 (1978) (remand order), *final decision*, 39 Agric. Dec. 862 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984)); *accord*, *In re Winger*, 38 Agric. Dec. 182, 188 (1979).

This principle is vital to the efficient handling of the Department's numerous regulatory cases. If a party were free

to petition to reopen the hearing to take further evidence whenever it was discovered that additional evidence in the party's possession at the time of the original hearing would be helpful, it would completely disrupt the administrative process.

Respondent, represented by an able and well-experienced attorney, did not seek to have the hearing reopened, which would have afforded complainant an opportunity to engage in cross-examination with respect to the alleged settlement agreement. Cross-examination might have revealed that the settlement agreement (assuming that it was entered into) is of no consequence here. For example, I have decided a number of cases in which parties have agreed to accept a fraction of the amount due, because of the debtor's poor financial condition.<sup>5</sup> Since respondent failed to avail himself of the opportunity to have newly discovered evidence considered in a proper manner, I attach no weight whatever to respondent's arguments and documents filed after the hearing record was closed.

The seriousness of a failure to pay for livestock is explained in *In re Garver*, 45 Agric. Dec. 1090, 1101-04 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988), in which it is stated that 2- to 5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30- to 60-day suspension orders would have been issued in comparable cases a few years ago. *Garver* explains the serious nature of failures to pay for livestock, and the need for a very severe sanction in failure to pay cases, as follows (45 Agric. Dec. at 1101-04):

Respondent's failure to pay for about \$700,000 worth of livestock fully justifies the 2-year suspension order requested by complainant. It should be noted that there has been a drastic change in complainant's sanction policy with respect to failure to pay violations in recent years. For many years, a person who deprived a livestock seller of 1% of the value of his livestock by false weighing would be given a more severe sanction than a person who deprived the livestock seller of 100% of the value of his livestock by failing to pay for the

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<sup>5</sup>See, e.g., *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. \_\_\_\_ (Apr. 21, 1989); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. \_\_\_\_ (Jun. 27, 1989); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1603 n. 1 (1985), *annot. dismissed*, No. 85-1590 (D.C.

livestock. In the latter case, a 30-day suspension order was typical. (I inherited that policy and did not change it during the period I was administrator of the Packers and Stockyards Act regulatory program.)

I suggested a drastic change in that policy in *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978). In that case, livestock sellers lost over half a million dollars because respondents took money from their livestock business, which was needed to pay sellers, and lost it gambling on the commodity futures market (37 Agric. Dec. at 550). Complainant recommended the usual 30-day "slap on the wrist" suspension order, which was imposed by the ALJ. When respondent appealed, I *sua sponte* raised the issue as to whether the sanction should be increased on appeal, and suggested in an order requesting additional briefs that a 5-year suspension order seemed appropriate. In imposing a 60-day suspension order in that case, it is stated (37 Agric. Dec. at 550-51):

Just last year Congress indicated its concern that livestock producers be paid for their livestock by the enactment of amendments to the Packers and Stockyards Act which impose payment requirements even more stringent than those previously imposed by the regulations issued under the Act (Public Law 94-110, 94th Cong., 2nd Sess.; 90 Stat. 1249). In the House Report on the bill relating to these amendments, it is stated (H. Rep. No. 94-1043, 94th Cong., 2nd Sess., p. 5; see, also, Sen. Rep. No. 94-932, 94th Cong., 2nd Sess., pp. 5-6):

USDA figures show that in 1973 some \$31 billion worth of livestock and \$4 billion worth of poultry were marketed in the United States, representing approximately one-third of all farm income. Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance. No individual is engaged in a riskier endeavor or one more vital to the national interest than the producer. And no entrepreneur is so completely at the mercy of the marketplace. The livestock producer, if he successfully combats the vicissitudes of weather, financing, skyrocketing costs, etc., must sell when his cattle are ready irrespective of the market. His livestock may represent his entire year's output. And, if he is not paid, he faces ruin. While some may argue that business is business and that farmers must take their chances along with everyone else, this Committee must view the situation from a larger perspective. We would be derelict in our responsibilities to the American people if we failed

to address the evils which have inflicted heavy losses upon the very producers upon whom the Nation depends for such an important part of its basic food supply.

In two recent cases involving failure to pay for about \$766,000.00 and \$3.2 million dollars worth of livestock, respectively (*In re Robert L. Benefiel*, 32 Agr Dec 1684 (1973); *In re James L. Heller*, 34 Agr Dec 1563 (1975)), respondents were suspended for five years. Although these cases are not weighty precedents because one is a consent case and the other a default case, they show, nonetheless, that a 5-year suspension order is at least regarded as appropriate in some failure to pay cases. I believe that the respondents' failure to pay over half a million dollars in the present case warrants a similar 5-year suspension order, particularly since the respondents took the money from their successful livestock business to finance their gambling ventures.

Under a similar regulatory program administered by the Department involving perishable agricultural commodities, a violator's license is routinely revoked for failing to pay a significant amount of money for produce, even where such failure is because of legitimate business losses. See, e.g., *In re Reese Sales Company*, 28 Agr Dec 1150 (1969), affirmed *sub nom. Reese Sales Company v. Hardin*, 458 F.2d 183 (C.A. 9); *In re Sam Leo Catanzaro*, 35 Agr Dec 26 (1976), [aff'd, No. 76-1613 (9th Cir. Mar. 9, 1977), printed in 36 Agric. Dec. 467 (1977)].<sup>6</sup> A revoked licensee may not apply for a new license for two years. 7 U.S.C. 499d(b).

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<sup>6</sup>Accord *In re B.G. Sales Co.*, 44 Agric. Dec. [2021 (1985)] (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took \$50,000 of respondent's funds in the bank's possession); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. [1505 (1983)] (nonpayment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983) (nonpayment because another firm failed to pay respondent \$248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (nonpayment because of bankruptcy), aff'd, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982) (nonpayment because of bankruptcy), aff'd, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec.



1116, 1129 (1982) (nonpayment because of bankruptcy of another firm owing respondent \$776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (nonpayment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (nonpayment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (nonpayment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (nonpayment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, [673 F.2d 551 (D.C. Cir. 1982)], *printed in* 41 Agric. Dec. 89 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (nonpayment because of strike and failure of others to pay respondent), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *reprinted in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (nonpayment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (nonpayment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (nonpayment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (nonpayment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (nonpayment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (nonpayment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (nonpayment because of bankruptcy of another firm owing respondent over \$130,000); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (nonpayment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (nonpayment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties).

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Although I believe the violations in this case warrant a 5-year suspension order to serve as an effective deterrent to future

similar violations, the complainant, in the oral argument before the Judicial Officer, recommended only a 60-day suspension order. Since it is the policy of the Judicial Officer "never to increase the sanction recommended by the administrative officials" (see Appendix, p. 21a), a 60-day suspension order will be issued rather than a 5-year suspension order.

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Subsequent to the decision in *Mid-States*, just quoted, the Judicial Officer overruled that portion of the Department's sanction policy which precluded him from imposing a sanction greater than that recommended by the administrative officials (*In re Rowland*, 40 Agric. Dec. 1934, 1952 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983)). Accordingly, if *Mid-States* were to be decided today, a 5-year suspension order would be issued.

The ALJ felt that it would be desirable to permit respondent to continue in the livestock industry with the safeguards that are presently in place. I disagree! It is not desirable to permit respondent to continue in the livestock industry since that would seriously undercut the deterrent value of the administrative sanction imposed in this case. It would encourage respondent and others to act in a similar irresponsible manner in the future, greatly endangering livestock sellers.

The ALJ also indicated that under the proposed arrangement to permit respondent to remain in the livestock business during all but 30 days of the 2-year suspension period, respondent's creditors could receive a "token" repayment of the indebtedness. However, that argument has routinely been rejected in determining sanctions imposed by this Department. It has consistently been held that any hardship to the respondent's creditors, customers, community, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interests that might be damaged as a result of a suspension order.<sup>7</sup>

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<sup>7</sup>*In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. [590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987)]; *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. [118 (1984)]; *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1172 (1983); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 606 (1983); *In re Melvin Beane Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re VPC, Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salinas, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir.

1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and see *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

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In many of the cases cited in note 6 of *Garver*, quoted above, the PACA creditors "voluntarily" accepted less than 100% of the amount owed in bankruptcy proceedings, and urged the Judicial Officer to impose a very lenient sanction on the bankrupt violator so that the violator could continue in business. All of such requests for leniency were routinely denied by the Judicial Officer, since the national public interest in deterring similar violations must prevail over the narrow interests of particular creditors (see the cases cited in *Garver*, note 7, quoted above).

In denying the petition for reconsideration in *Garver*, quoted above, it is emphasized that severe sanctions should be imposed in nonpayment cases, even where there was no misbehavior (such as fraud) by the respondent. The decision states (45 Agric. Dec. at 1957-59):

On August 15, 1986, respondent filed a petition for reconsideration challenging Finding of Fact 11 and arguing that a severe sanction is inappropriate and would have no deterrent effect on respondent or others.

Finding 11, which relates to respondent's sale of property used as security by the bank for its line of credit, and the bank's termination of the line of credit, is fully supported by the record. Moreover, it makes no difference why the bank terminated its line of credit. As stated in the original decision herein, note 2, the "bank's action in withdrawing respondent's line of credit did not cause his loss of at least \$700,000 [which is the actual cause of respondent's failure to pay], but merely exposed his insolvent condition."

As to the appropriateness of the sanction, respondent argues that a severe sanction should only be imposed in nonpayment cases where the nonpayment occurred because of fraud. Respondent's argument would, however, emasculate the 1976 payment provisions enacted by Congress. The Act was amended in 1976 to provide (7 U.S.C. § 228b):

**§ 228b. Prompt payment for purchase of livestock****(a) Full amount of purchase price required; methods of payment**

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

**(b) Waiver of prompt payment by written agreement; disclosure requirements**

Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of

(c) Delay in payment or attempt to delay deemed unfair practice

Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

The 1976 payment amendment does not use the term fraud or any synonym thereof. Congress was not concerned merely with fraudulent failures to pay. Congress was concerned with all failures to pay (see the legislative history quoted in the original decision herein at 18). The 1976 payment amendment was enacted because livestock buyers (primarily packers) failed to pay for substantial amounts of livestock. See *In re Beef Nebraska, Inc.*, 44 Agric. Dec. [2786 (1985), *aff'd*, 807 F.2d 712 (8th Cir. 1986)]. As stated in the House Report on the 1976 amendatory legislation (H.R. Rep. No. 1043, 94th Cong., 2d Sess. 5 (Apr. 14, 1976)):

Between 1958 and early 1975, 167 packers failed, leaving livestock producers unpaid for over \$43 million worth of livestock. By far the largest of such failures was that of American Beef Packers (ABP), which went bankrupt in January, 1975, leaving producers in 13 states unpaid for a total of over \$20 million in livestock sales.

The average loss to livestock sellers as a result of each packer failure from 1958 through early 1975 was \$257,485.02 ( $\$43,000,000 \div 167 = \$257,485.02$ ). If we omit the one \$20 million failure of American Beef Packers, the average loss to livestock sellers from each packer failure from 1958 through early 1975 was \$138,554.21 ( $\$23,000,000 \div 166 = \$138,554.21$ ).

In contrast to the average loss of \$138,554.21, just quoted, respondent failed to pay \$285,370.62 for livestock, or more than twice the average loss caused by packer failures, excluding American Beef.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, e.g., *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268,

424-32, 435-62 (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), attached as an Appendix to this decision.<sup>6</sup>

It should be noted that significant changes were made in the Department's sanction policy following (and as a result of) the holding in *Farrow v. USDA*, 760 F.2d 211 (8th Cir. 1985). The legislative history of the Act and the material relevant to the *Farrow* decision are set forth in *Spencer*, 46 Agric. Dec. at 424-31, 455-62 (Appendix at 198-208, 242-51).

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, e.g., *In re Hutto Stockyard, Inc.*, 48 Agric. Dec. \_\_\_\_ (Apr. 19, 1989) (\$20,000 civil penalty and 90-day suspension order applicable to all of respondents' businesses, including an auction yard not involved in respondents' weighing violations); *In re Mendocia*, 48 Agric. Dec. \_\_\_\_ (Mar. 16, 1989) (1-year suspension and \$10,000 civil penalty for weighing, bonding, and prompt payment violations); *In re Ferguson*, 48 Agric. Dec. \_\_\_\_ (Mar. 1, 1989) (6-month suspension and \$25,000 civil penalty (held in abeyance) for increasing prices in commission transactions); *In re Great American Veal, Inc.*, 48 Agric. Dec. \_\_\_\_ (Jan. 19, 1989) (\$129,000 civil penalty for failing to pay for livestock, operating while insolvent, giving undue preference to a creditor, and taking over another packer's inventory without paying the packer's creditors), *appeal docketed*, No. 89-3108 (3d Cir. Feb. 22, 1989); *In re Tiemann*, 47 Agric. Dec. \_\_\_\_ (Oct. 20, 1988) (5-year suspension for failure to pay \$27,000 for livestock, to be terminated after 180 days if full payment made); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. \_\_\_\_ (Aug. 13, 1987) (1-year suspension for custodial account violations and various fraudulent activities); *In re Parchman*, 46 Agric. Dec. 791 (1987) (90-day suspension and \$10,000 civil penalty for weighing violations), *aff'd*, 852 F.2d 858 (6th Cir. 1988); *In re Rotches Park Packers, Inc.*, 46 Agric. Dec. 573 (1987) (\$50,000 civil penalty for failing to pay for meat products); *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268 (1987) (10-year suspension and \$30,000 civil penalty for

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<sup>6</sup>Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, e.g., in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 626 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-Ides Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re*

increasing prices and weights in commission purchases), *aff'd*, 841 F.2d 1431 (9th Cir. 1988); *In re Welch*, 45 Agric. Dec. 1932 (1986) (decision as to Benson) (\$10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act for fraud by an auction market employee); *In re Garver*, 45 Agric. Dec. 1090 (1986) (2-year suspension for failing to pay for livestock), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 109 S. Ct. 63 (1988); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986) (\$50,000 civil penalty for commercial bribery), *remanded*, 820 F.2d 1103 (9th Cir. 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986) (\$50,000 civil penalty for commercial bribery); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590 (1986) (6-month suspension for custodial account and check-kiting violations), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (decision as to Millsbaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year, for check-kiting, custodial account and payment violations, and purchasing livestock for speculation out of consignments); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand) (8-month suspension and \$10,000 civil penalty for fraudulent sales and purchases); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final consent decision*, 44 Agric. Dec. 1971 (1985) (\$10,000 civil penalty for discriminatory promotional allowances); *In re Powell*, 46 Agric. Dec. 49 (1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. 1220 (1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984) (\$77,000 civil penalty, with \$27,000 suspended, for payment, bond and trust violations); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year suspension for payment violations), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. 1848 (1983) (\$20,000 civil penalty for bait-and-switch advertising and deceptive practices), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

For the foregoing reasons, the following order should be issued.

#### Order

Respondent Sam Odom, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay for livestock purchases.

Respondent Sam Odom is suspended as a registrant under the Act for a period of 5 years, *Provided, however*, That upon application to the Packers and Stockyards Administration a supplemental order may be issued terminating the suspension after 1 year upon demonstration by respondent that all unpaid

livestock sellers have been paid in full, *And provided further*, That this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's employment by another registrant after the expiration of the 1-year period of suspension.

The cease and desist provisions of this order shall become effective on the day after service of this order. The suspension provisions shall become effective on the 30th day after service of this order, *Provided, however*, That if by any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or the part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto, or (ii) upon a showing made by complainant that it is not likely that such an order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

#### APPENDIX

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 424-32, 435-62, (1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

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**In re: PINE RIDGE FARMS, INC., DAVID FARRINGTON, GLORIA FARRINGTON, WILLIAM T. MORRIS, and FIRST NATIONAL BANK at PARIS.**

**P&S Docket No. D-88-81.**

**Order of Dismissal as to Respondent Gloria Farrington filed May 15, 1989.**

Peter V. Train, for Complainant.

Respondent, Pro se.

*Order of Dismissal issued by Edwin S. Bernstein, Administrative Law Judge.*

At complainant's request, and for good cause shown, the complaint herein as to respondent Gloria Farrington is hereby dismissed.

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**NO BAR LIVESTOCK, INC.**

**File No. D-88-45.**

**Order filed June 21, 1989.**



Respondent has demonstrated that it is in full compliance with such bonding requirements. Accordingly,

It is hereby ordered that the suspension provision of the order issued May 1, 1989, is terminated. The Order shall remain in full force and effect in all other respects.

Copies of this Order shall be served upon the parties.

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**In re: ROBERT D. COCKERHAM.**

**P&S Docket No. 6275.**

**Supplemental Order filed June 30, 1989.**

Eric Paul, for Complainant.

William B. Deas, for Respondent.

*Supplemental Order issued by Victor W. Palmer, Chief, Administrative Law Judge.*

On April 17, 1984, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act until he demonstrates that he is no longer insolvent.

Respondent has demonstrated that he is solvent. Accordingly,

It is hereby ordered that the suspension provision of the order issued April 17, 1984, is terminated. The order shall remain in full force and effect in all other respects.

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In re: EDGAR LAMAR HOLCOMB.  
P&S Docket No. D-89-2.  
Decision and Order filed March 8, 1989.

*Failure to file an answer - Failure to pay - Issuing insufficient funds checks.*

*June McCavit, for Complainant.*

*Respondent, Pro se.*

*Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.*

This disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Acting Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

#### Findings of Fact

1. (a) Edgar Lamar Holcomb, hereinafter referred to as the respondent, is an individual whose mailing address is General Delivery, Fort Deposit, Alabama 36032.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. (a) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph 11(a) of the complaint, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn

because respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) Respondent, on or about the dates and in the transactions set forth in paragraph II(b) of the complaint, as well as in the transactions set forth in paragraph II(a) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of September 7, 1988, \$165,692.01 remained unpaid for livestock purchases set forth in paragraph II of the complaint.

### Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated Sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

### Order

Respondent Edgar Lamar Holcomb, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock;  
and
3. Failing to pay the full purchase price of livestock.

Respondent Edgar Holcomb is suspended as a registrant under the Act for a period of five (5) years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of 180 days upon demonstration by respondent that all unpaid livestock sellers have been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the 180 day period of suspension.

The provisions of this Order shall become effective on the sixth day after service Order on respondent. Copies of this decision shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final on June 6, 1989.-Editor]

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